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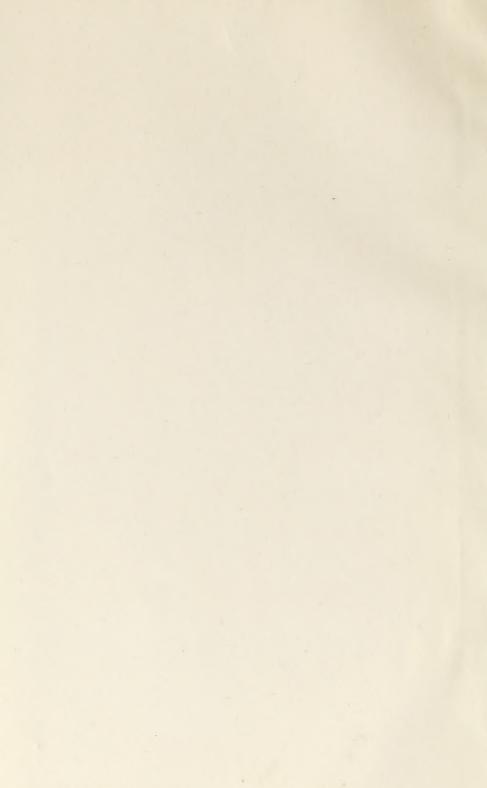
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#### United States

## Circuit Court of Appeals

For the Ninth Circuit.

## Transcript of Record.

(IN TWO VOLUMES.)

PABST BREWING COMPANY, a Corporation,
Plaintiff in Error,

VS.

E. CLEMENS HORST COMPANY, a Corporation, Defendant in Error.

#### VOLUME I.

Pages 1 to 256, Inclusive.)

Upon Writ of Error to the United States District Court of the Northern District of California,

Second Division.



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In the Superior Court of the County of Sacramento, State of California.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

#### Complaint.

The plaintiff in the above-entitled action complains of the defendant herein and for cause of action alleges:

- 1. Plaintiff now is and during all the times mentioned was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New Jersey and doing business as such corporation in the State of California.
- 2. Defendant now is and during all the times mentioned was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Wisconsin but doing business as such corporation in the State of California.
- 3. In the month of August, 1911, and by virtue of certain contracts in writing made and entered into between plaintiff and defendant for the price of twenty cents (\$0.20) per pound, F. O. B. cars in the State of California, plaintiff agreed to sell and deliver to defendant and defendant agreed to purchase, pay for and receive from plaintiff two thousand (2,000) Bales of Cosumnes hops to be grown in the State of California during the year 1912, containing

in the aggregate approximately two hundred (200) tons of hops aforesaid; delivery of said hops to be made after the curing of said crop of 1912 and prior to the first day of March, 1913.

4. That thereafter, in the year 1912, plaintiff did procure said two thousand bales of Cosumnes hops of the said crop of 1912 in accordance with the terms and provisions of said contract and agreement with defendant, and in full the provisions thereof did offer and did tender the same defendant. [1\*]

That, however, defendant refused to accept, receive or pay for said hops or any thereof.

- 5. Plaintiff duly performed and offered to perform all the acts, conditions and things on its part to be performed in accordance with said contract and agreement for said sale of hops aforesaid but defendant neglected and refused to do or perform the conditions on its part to be performed as aforesaid.
- 6. By said failure and refusal on the part of defendant to accept, receive and pay for said hops as aforesaid plaintiff has been damaged in the sum of Thirty-two Thousand (\$32,000.00) Dollars.

WHEREFORE, plaintiff prays judgment of the Court against defendant in the sum of \$32,000.00 and costs of suit.

## DEVLIN & DEVLIN and W. H. CARLIN,

Attorneys for Plaintiff.

State of California, City and County of San Francisco,—ss.

E. Clemens Horst, being duly sworn, says that he

<sup>\*</sup>Page-number appearing at foot of page of original certified Record.

is President of E. Clemens Horst Company, a Corporation, the Plaintiff in the above-entitled action; that he has read the above and foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

#### E. CLEMENS HORST.

Subscribed and sworn to before me, this 1st day of June, 1913.

[Seal]

M. I. LAWRENCE,

Notary Public.

My commission expires January 27th. 1914. [2]

[Endorsed]: Indexed No. 17,402. Dept. —. Dept. 3. In the Superior Court, County of Sacramento, State of California. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Complaint. Filed Jun. 19, 1913. E. F. Pfund, Clerk. By H. W. Hall, Deputy. W. H. Carlin, and Devlin & Devlin, Ellis Block, Marysville, Cal., Attorneys for Plaintiff. [3]

#### Summons.

In the Superior Court of the State of California, in and for the County of Sacramento.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

Action brought in the Superior Court of the State of California, in and for the County of Sacramento, and the Complaint filed in said County of Sacramento, in the office of the clerk of said Superior Court.

Sec. 407, C. C. P.

The People of the State of California, Send Greeting to Pabst Brewing Company, a Corporation, Defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Superior Court of the State of California, in and for the County of Sacramento, and to answer the complaint filed therein, within ten days after the service on you of this Summons, if served within this county, or, if served elsewhere, within thirty days.

And you are hereby notified that unless you so appear and answer the said Complaint as above required, the plaintiff will take judgment for any money or damages demanded in the Complaint as arising upon contract, or will apply to the Coart for any other relief demanded in the complaint.

Witness my hand and the seal of said Superior Court of the State of California, in and for the County of Sacramento this 19th day of June, 1913.

[Seal]

E. F. PFUND,

Clerk,

By H. W. Hall, Deputy Clerk. [4] Jun. 28, 1913, State of California,

City and County of San Francisco,—ss.

Meurice Swim, being duly sworn, deposes and says: That he is, and was at the time of the service of the papers herein referred to, a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; that he personally served the within Summons on the 28th day of June, A. D. 1913, on PABST BREWING COMPANY, a corporation, by delivering to and leaving with J. T. HARMES, personally—the designated agent of said PABST BREWING COMPANY, in the State of California, and the person upon whom service of process can be made for said PABST BREWING COM-PANY, in the State of California —said Defendant therein named, personally, in the City and County of San Francisco, a copy of said Summons attached to a true and correct copy of the Complaint in the action therein named.

#### MEURICE SWIM.

Subscribed and sworn to before me, this 1st day of July, 1913.

[Seal]

D. B. RICHARDS,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: 17402. Dept. 3. Superior Court, County of Sacramento Department No. ——. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Original Summons. Filed Jul. 7, 1913. E. F. Pfund, Clerk. By H. W. Hall, Deputy. [5]

In the Superior Court of the State of California in and for the County of Sacramento.

No. 17,402—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

#### Petition for Removal of Cause.

To the Honorable Superior Court of the State of California, in and for the City and County of San Francisco:

Pabst Brewing Company, a corporation, the defendant above-named, appearing specially solely for the purpose of presenting this petition, praying for the removal of the above-entitled cause as hereinafter set forth, presents this its petition and respectfully shows to the Court:

That the above-entitled action is a suit of a civil nature of which the District Court of the United States in and for the Northern District of California, Second Division, has original jurisdiction, and that the defendant desires to remove the said suit from the Superior Court of the State of California in and for the County of Sacramento, to the said District Court of the United States in and for the Northern District of California, Second Division;

That the said action was brought in and is now pending in the said Superior Court; [6]

That the time within which this defendant is re-

quired by the laws of the State of California or by any rule or rules of the said Superior Court to answer or plead to the complainant of the plaintiff herein has not elapsed or expired, and the matter in controversy in said suit exceeds, exclusive of interest and costs, the sum and value of Three Thousand (3000) Dollars;

That E. Clemens Horst Company, a corporation, plaintiff in the said suit, was at the time of the commencement of said suit and ever since has been and now is a corporation created, organized and existing under and pursuant to the laws of the State of New Jersey, and a resident and citizen of said State of New Jersey;

That the defendant Pabst Brewing Company, a corporation, the defendant in the above-entitled action, at the time of the commencement of said suit, was and ever since has been and now is a corporation created, organized and existing under the laws of the State of Wisconsin, having its principal place of business in said State of Wisconsin, domiciled and a resident in said last-mentioned State and a citizen thereof;

That your petitioner, the defendant above named, herewith presents its bond with American Surety Company of New York, as surety, in the sum of Five Hundred (500) Dollars, for this petitioner's entering in the said District Court, within thirty days from the date of filing this petition, a certified copy of the record in the above-entitled suit, and for this petitioner's paying all costs that may be awarded by the said District Court if said District Court shall hold

that such suit was wrongfully or improperly removed thereto, and also for this [7] petitioner's appearing and entering special bail in such suit, if special bail was originally requisite therein;

That said American Surety Company of New York, the surety named in and that executed the said bond, is a corporation created, organized and existing under the laws of the State of New York, and is duly authorized to execute the said bond in the State of California, and to execute bonds and undertakings as surety receivable in and by all the courts of the State of California and by the said District Court of the United States in and for the Northern District of California, Second Division;

That there are no other parties to the said suit except the said plaintiff and the said defendant;

That by reason of the premises this petitioner, the said defendant, desires and is entitled to have the said suit removed from said Superior Court of the State of California, in and for the County of Sacramento, into the District Court of the United States in and for the Northern District of California, Second Division;

That the said District Court of the United States, in and for the Northern District of California, Second Division, is the District Court of the United States for the proper District, being the District Court of the United States held in the district where said suit is pending;

WHEREFORE, your petitioner prays that this Court accept this petition and the said bond and proceed no further in the said suit, except to make an order directing the removal of the said suit as required by law, and to order and direct a certified copy of the record herein to be made as provided [8] by law.

# PABST BREWING COMPANY. By FRANK H. POWERS, Its Attorney in Fact, Petitioner.

#### HELLER, POWERS & EHRMAN,

Attorneys for Petitioner and Defendant, Pabst Brewing Company, Appearing Specially Solely for the Purpose of Presenting This Petition Praying for the Removal of the Above-entitled Cause.

State of California, City and County of San Francisco,—ss.

Frank H. Powers, being first duly sworn, deposes and says:

That he is the attorney in fact for Pabst Brewing Company, a corporation, defendant named as petitioner in the above-entitled petition, and that he is duly authorized by said Pabst Brewing Company, as such attorney in fact, to sign this petition and the bond therein referred to; that none of the officers of said corporation reside in or are in the State of California; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on his information or belief, and as to those matters that he believes it to be true.

FRANK H. POWERS.

Subscribed and sworn to before me this 22d day of July, 1913.

[Notarial Seal] A. K. DAGGETT,

Notary Public, in and for the City and County of San Francisco, State of California. [9]

[Endorsed]: No. 17,402. Dept. 3. Superior Court, County of Sacramento, State of California. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Petition for Removal of Cause. Filed Jul. 23, 1913. E. F. Pfund, Clerk. By Frank A. Prior, Deputy. Heller, Powers & Ehrman, Attorneys for Defendant. Heller, Powers & Ehrman, Attorneys at Law, Nevada Bank Building, San Francisco, Cal. [10]

In the Superior Court of the State of California, in and for the County of Sacramento.

No. 17,402—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

#### Bond on Removal of Cause.

Know All Men by These Presents: That Pabst Brewing Company, a corporation created, organized and existing under the laws of the State of Wisconsin, the defendant named in the above-entitled action, as Principal, and American Surety Company of New York, a corporation created, organized and existing under the laws of the State of New York, as Surety, are held and firmly bound unto E. Clemens Horst Company, a corporation, the plaintiff in the above-entitled action, and to its successors and assigns, in the sum of Five Hundred (500) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made said Pabst Brewing Company and said American Surety Company of New York bind themselves and their successors, and the successors of each of them, jointly and severally, firmly by these presents.

Dated this 22d day of July, 1913. [11]

WHEREAS, the above-entitled action, in which E. Clemens Horst Company is plaintiff and the above-bounden Pabst Brewing Company is defendant, is now pending in the Superior Court of the State of California, in and for the County of Sacramento, and the above-bounden Pabst Brewing Company, has made and filed, or is about to make and file, its petition in said Court for the removal of the said suit into the District Court of the United States, in and for the Northern District of California, Second Division, upon the grounds in said petition set forth, pursuant to the provisions of the Act of Congress in that behalf,—

NOW, THEREFORE, the condition of the above obligation is such that if the above bounden Pabst Brewing Company shall within thirty days from the date of filing said petition, enter in such District Court a certified copy of the record in such suit and shall pay all costs that may be awarded by the said

District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in such suit, if special bail was originally requisite, then said obligation shall be null and void, and otherwise shall remain in full force and effect.

PABST BREWING COMPANY (a Corporation).

By FRANK H. POWERS, (Seal)
Its Attorney in Fact.

AMERICAN SURETY COMPANY OF NEW YORK,

By H. J. DOUGLAS, Resident Vice-president.

[Seal] Attest: V. H. GALLAWAY, Resident Assistant Secretary. [12]

[Endorsed]: No. 17,402. Dept. 3. Superior Court, County of Sacramento, State of California. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Bond on Removal of Cause. Filed Jul. 23, 1913. E. F. Pfund, Clerk. By Frank A. Prior, Deputy. Heller, Powers & Ehrman, Attorneys for Defendant. Heller, Powers & Ehrman, Attorneys at Law, Nevada Bank Building, San Francisco, Cal. [13]

In the Superior Court of the State of California, in and for the County of Sacramento.

No. 17,402.—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

#### Notice of Motion for Removal of Cause.

To E. Clemens Horst Company, a Corporation, Plaintiff Above Named, and to Devlin & Devlin and W. H. Carlin, Attorneys for the Plaintiff:

You and each of you will please take notice that the petition of Pabst Brewing Company, the defendant, for the removal of the above-entitled suit to the District Court of the United States, in and for the Northern District of California, Second Division, and the bond on removal of the said suit, copies of which petition and bond are hereto attached, will be filed in the above-entitled Superior Court of the State of California, in and for the County of Sacramento, on or before Wednesday, the 23d day of July, 1913, and that on Wednesday, the 23d day of July, 1913, at the hour of 3 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the defendant will present the said petition and bond to the said Superior Court in the courtroom of department No. 3 thereof, in the county courthouse, at the City of Sacramento, County of Sacramento, State of California, and will thereupon move and ask the said

Court to make an order accepting the said petition and bond and directing and requiring the clerk of said court to prepare and certify a copy of the record in said suit and directing the removal and transfer thereof to said District Court of [14] the United States in and for the Northern District of California, Second Division.

Said motion will be based upon all the papers and files herein, including said petition and bond, and upon the grounds that the plaintiff was at the time of the commencement of the above-entitled action a corporation created, organized and existing under the laws of the State of New Jersey and a resident and citizen thereof, and that the defendant was at the time of the commencement of the above-entitled action and ever since has been and now is a corporation created, organized and existing under the laws of the State of Wisconsin, and a resident and citizen thereof.

You and each of you will please also take notice that attached hereto is a copy of an order shortening time of service of this notice.

Dated: July 23, 1913.

HELLER POWERS & EHRMAN,
Attorneys for Defendant. [15]

In the Superior Court of the State of California, in and for the County of Sacramento.

No. 17,402—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation, Defendant.

#### Order Shortening Time.

Upon reading and filing the foregoing notice of motion and good cause appearing therefor,—

IT IS HEREBY ORDERED that the time within which said notice of motion may be served be and the same hereby is shortened so that if said notice of motion be served at any time prior to 2 o'clock P. M. on Wednesday the 23d day of July, 1913, such service shall be valid and of the same effect as if full five days' notice had been given.

Dated this 23d day of July, 1913.

C. N. POST, Judge of the Superior Court.

[Endorsed]: Filed Jul. 23, 1913. E. F. Pfund, Clerk. By H. W. Hall, Deputy. [16]

In the Superior Court of the State of California, in and for the County of Sacramento.

No. 17,402—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

#### Petition for Removal of Cause.

To the Honorable Superior Court of the State of California, in and for the City and County of San Francisco:

Pabst Brewing Company, a corporation, the defendant above named, appearing specially solely for the purpose of presenting this petition, praying for the removal of the above-entitled cause as hereinafter set forth, presents this its petition and respectfully shows to the Court:

That the above-entitled action is a suit of a civil nature of which the District Court of the United States in and for the Northern District of California, Second Division, has original jurisdiction, and that the defendant desires to remove the said suit from the Superior Court of the State of California in and for the County of Sacramento, to the said District Court of the United States in and for the Northern District of California, Second Division;

That the said action was brought in and is now pending in the said Superior Court; [17]

That the time within which this defendant is re-

quired by the laws of the State of California or by any rule or rules of the said Superior Court to answer or plead to the complaint of the plaintiff herein has not elapsed or expired, and the matter in controversy in said suit exceeds, exclusive of interest and costs, the sum and value of Three Thousand (3000) Dollars;

That E. Clemens Horst Company, a corporation, plaintiff in the said suit, was at the time of the commencement of said suit and ever since has been and now is a corporation created, organized and existing under and pursuant to the laws of the State of New Jersey, and a resident and citizen of said State of New Jersey;

That the defendant Pabst Brewing Company, a corporation, the defendant in the above-entitled action, at the time of the commencement of said suit, was and ever since has been and now is a corporation created, organized and existing under the laws of the State of Wisconsin, having its principal place of business in said State of Wisconsin, domiciled and a resident in said last mentioned state and a citizen thereof:

That your petitioner, the defendant above named, herewith presents its bond with American Surety Company of New York, as surety, in the sum of Five Hundred (500) Dollars, for this petitioner's entering in the said District Court, within thirty days from the date of filing this petition, a certified copy of the record in the above-entitled suit, and for this petitioner's paying all costs that may be awarded by the said District Court if said District Court shall

hold that such suit was wrongfully or improperly removed thereto, and also for this [18] petitioner's appearing and entering special bail in such suit, if special bail was originally requisite therein;

That said American Surety Company of New York, the surety named in and that executed the said bond, is a corporation created, organized and existing under the laws of the State of New York, and is duly authorized to execute the said bond in the State of California, and to execute bonds and undertakings as surety receivable in and by all the courts of the State of California and by the said District Court of the United States in and for the Northern District of California, Second Division;

That there are no other parties to the said suit except the said plaintiff and the said defendant;

That by reason of the premises this petitioner, the said defendant, desires and is entitled to have the said suit removed from said Superior Court of the State of California in and for the County of Sacramento into the District Court of the United States in and for the Northern District of California, Second Division;

That the said District Court of the United States, in and for the Northern District of California, Second Division, is the District Court of the United States for the proper District, being the District Court of the United States held in the District where said suit is pending.

WHEREFORE, your petitioner prays that this Court accept this petition and the said bond and proceed no further in the said suit, except to make an order directing the removal of the said suit as required by law, and to order and direct a certified copy of the record herein to be made as provided [19] by law.

# PABST BREWING COMPANY, By FRANK H. POWERS,

Its Attorney in Fact,
Petitioner.

## HELLER, POWERS & EHRMAN,

Attorneys for Petitioner and Defendant, Pabst Brewing Company, Appearing Specially Solely for the Purpose of Presenting this Petition Praying for the Removal of the Above-entitled Cause.

State of California,

City and County of San Francisco,—ss.

Frank H. Powers, being first duly sworn, deposes and says:

That he is the attorney in fact for Pabst Brewing Company, the corporation defendant named as petitioner in the above-entitled petition and that he is duly authorized by said Pabst Brewing Company, as such attorney in fact, to sign this petition and the bond therein referred to; that none of the officers of said corporation reside in or are in the State of California; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to matters therein stated on his information or belief, and as to those matters that he believes it to be true.

FRANK H. POWERS.

Subscribed and sworn to before me this 22d day of July, 1913.

[Notarial Seal] A. K. DAGGETT,

Notary Public in and for the City and County of San Francisco, State of California. [20]

In the Superior Court of the State of California, in and for the County of Sacramento.

No. 17,402—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

## Bond on Removal of Cause.

Know All Men by These Presents: That Pabst Brewing Company, a corporation created, organized and existing under the laws of the State of Wisconsin, the defendant named in the above-entitled action, as Principal, and American Surety Company of New York, a corporation created, organized and existing under the laws of the State of New York, as Surety, are held and firmly bound unto E. Clemens Horst Company, a corporation, the plaintiff in the above-entitled action, and to its successors and assigns, in the sum of Five Hundred (500) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made said Pabst Brewing Company and said American Surety Company of New York bind themselves and their suc-

cessors, and the successors of each of them, jointly and severally, firmly by these presents.

Dated this 22d day of July, 1913. [21]

WHEREAS, the above-entitled action, in which E. Clemens Horst Company is plaintiff and the above-bounden Pabst Brewing Company is defendant, is now pending in the Superior Court of the State of California, in and for the County of Sacramento, and the above-bounden Pabst Brewing Company, has made and filed, or is about to make and file, its petition in said Court for the removal of the said suit into the District Court of the United States, in and for the Northern District of California, Second Division, upon the grounds in said petition set forth, pursuant to the provisions of the act of Congress in that behalf.—

NOW, THEREFORE, the condition of the above obligation is such that if the above-bounden Pabst Brewing Company shall within thirty days from the date of filing said petition, enter in such District Court a certified copy of the record in such suit and shall pay all costs that may be awarded by the said District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in such suit, if special bail was originally requisite, then said obligation shall be null and void, and other-

wise shall remain in full force and effect.

PABST BREWING COMPANY (a Corporation),

By FRANK H. POWERS, (Seal)

Its Attorney in Fact.

AMERICAN SURETY COMPANY OF NEW YORK

> By H. J. DOUGLAS, Resident Vice-President.

[Seal] Attest: V. H. GALLOWAY, Resident Assistant Secretary [22]

Service of the within Notice of Motion for Removal of Cause and Order Shortening Time of Service and Receipt of a Copy thereof are hereby admitted this 23d day of July, 1913, reserving all

objections.

W. H. CARLIN and DEVLIN & DEVLIN, Attorneys for Plaintiff.

[Endorsed]: No. 17,402. Dept. 3. Superior Court, County of Sacramento, State of California. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Notice of Motion for Removal of Cause and Order Shortening Time. Filed Jul. 23, 1913. E. F. Pfund, Clerk. By Frank A. Prior, Deputy. Heller, Powers & Ehrman, Attorneys for Defendant. Heller, Powers & Ehrman, Attorneys at Law, Nevada Bank Building, San Francisco, Cal. [23]

In the Superior Court of the State of California in and for the County of Sacramento.

No. 17,402—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation, Defendant.

Order Removing Cause to the District Court of the United States, in and for the Northern District of California, Second Division.

This cause coming on for hearing upon the application of the defendant for an order transferring the cause to the District Court of the United States, in and for the Northern District of California, Second Division, and it appearing and the Court finding that due notice of the application for such removal and of the presentation of a petition and bond therefor has been given as required by law and the order of this Court, and the defendant now in open court, in accordance with said notice, having presented its petition for such removal in due form of law and having presented its bond with good and sufficient surety duly conditioned as required by law, and said petition and bond having been filed in this court and it appearing to the Court that this is a proper cause for removal to said District Court of the United States in and for the Northern District of California, Second Division,—

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that said petition be and the same hereby is accepted and [24] that the said bond be and the same hereby is accepted and approved.

IT IS FURTHER ORDERED AND ADJUDGED that said cause be and it is hereby removed to the District Court of the United States in and for the Northern District of California, Second Division.

Done in open court this 23d day of July, 1913.

C. N. POST,

Judge of the Superior Court.

#### OFFICE OF THE COUNTY CLERK 714.

State of California,

County of Sacramento,—ss.

I, E. F. Pfund, County Clerk of the County of Sacramento, State of California, and ex-officio clerk of the Superior Court held in and for said county and State aforesaid, hereby certify that I have compared the foregoing copy with the original Complaint, Summons, Petition for Removal of Cause, Bond on Removal of Cause, Notice of Motion for Removal of Cause, Order Shortening Time and Order Removing Cause to the District Court of the U. S. etc., in the above-entitled matter on file and of record in my office, and that same is a full, true and correct copy of such original, with the endorsements thereon, and of the whole thereof.

Attest my hand and seal of said Court this 2d day of August, A. D. 1913

[Seal]

E. F. PFUND,
County Clerk.
By A. Grelich,
Deputy Clerk.

Due service of the within order removing cause, etc., and receipt of a copy thereof are hereby admitted this 23d day of July, 1913.

W. H. CARLIN and DEVLIN & DEVLIN, Attorneys for Plaintiff. [25]

[Endorsed]: No. 17,402. Dept. 3. Superior Court, County of Sacramento, State of California. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Order Removing Cause to the District Court of the U. S. etc. Filed Jul. 23, 1913. E. F. Pfund, Clerk. By H. W. Hall, Deputy. Heller, Powers & Ehrman, Attorneys for Defendant. Heller, Powers & Ehrman, Attorneys at Law, Nevada Bank Building, San Francisco, Cal.

[Endorsed]: 1. 15,678. United States District Court. Second Division. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Certified Copy of Complaint, Original Summons, Petition for Removal of Cause, Bond on Removal of Cause, Notice of Motion for Removal of Cause and Order Shortening Time, and Order Removing Cause to the District Court of the U. S., etc. Filed Aug. 4, 1913.

W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

In the District Court of the United States, in and for the Northern District of California, Second Division.

(Removed from the Superior Court of the County of Sacramento, State of California.)

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

#### Answer.

The defendant in the above-entitled action makes answer to the complaint of the plaintiff in the aboveentitled action as follows:

## FIRST.

For a first defense, defendant denies and alleges as hereinafter mentioned:

I.

Defendant denies that in the month of August, 1911, or at any time, any contracts in writing, or at all, were made and entered into between the plaintiff and defendant in manner and form as alleged in Paragraph 3 of the complaint, but on the contrary, defendant alleges that in the month of August, 1911, at the City and County of San Francisco, State of California, the plaintiff caused a telegram to be transmitted to the defendant from the said City and County of San Francisco, to the defendant in the

City of Milwaukee, State of Wisconsin, whereby plaintiff offered to sell to the defendant one thousand bales of choice Cosumnes air-dried hops of the crop of 1912, at the price of twenty cents a pound f. o. b. cars in the State of California, and defendant, by telegram transmitted by the defendant from Milwaukee aforesaid to the plaintiff at the City and County of [27] San Francisco aforesaid, accepted the said offer; that no time for the delivery of the said one thousand bales of hops and no time for the payment of the purchase price of said hops was proposed or fixed by the said telegraphic offer or by the said telegraphic acceptance; that thereafter, in the same month, the plaintiff, at San Francisco, aforesaid, transmitted another telegram to the defendant at Milwaukee aforesaid, whereby the plaintiff offered to sell to the defendant an additional one thousand bales of choice air-dried Cosumnes hops, to be delivered by the plaintiff to the defendant at Milwaukee aforesaid, at the price of twenty cents a pound plus freight thereon from the Pacific Coast, and thereafter in the said month of August, 1911, the defendant, by telegram sent by the defendant from Milwaukee aforesaid to the plaintiff at San Francisco aforesaid, accepted the said last-mentioned offer; that no time for the delivery of the said last-mentioned hops and no time for the payment of the purchase price thereof was proposed or fixed in the last mentioned telegraphic offer and acceptance thereof:

That thereafter, in the month of September, 1911, the plaintiff presented to the defendant, at Milwaukee aforesaid, a proposed form of written and printed contract relating to the hops mentioned in the said telegraphic offers and acceptances providing in substance that the time of shipment and delivery of the said hops should be during the months, inclusive, of September to December, meaning the months of September to December, 1912, and also containing many printed clauses and conditions in relation to the proposed sale and delivery of the said hops, which clauses and conditions had not been discussed or referred to in the said telegraphic offer and acceptance, and defendant refused to sign the said proposed contract and did [28] not sign the same, but immediately thereafter and in the said month of September, 1911, the defendant in writing informed the plaintiff that defendant's understanding of any contract between the plaintiff and defendant in relation to the said hops was that shipments and deliveries of the said hops should be made by the plaintiff to defendant during the months of October, November and December of 1912 and January and February of 1913, and that samples of any hops which the plaintiff should offer for delivery to defendant in pursuance of the aforesaid telegraphic offers and acceptances, should and must be submitted by plaintiff to the defendant and be approved by the defendant before shipments and deliveries should be made; that the plaintiff accepted and agreed to defendant's interpretation and understanding of the said telegraphic offers and acceptances, and thereafter, in the months of September and October, 1912, the plaintiff submitted and offered to defendant, for its approval,

before shipment, samples of hops which plaintiff claimed were choice Cosumnes hops of the crop of 1912; that the said samples were not choice Cosumnes hops, but were hops of poor and inferior quality, and defendant refused to approve the same;

That thereafter, in the month of October, 1912, the plaintiff in writing offered the defendant to modify any contract which might have been entered into between the plaintiff and defendant by the telegraphic offers and acceptances as aforesaid, in the following respect, that is to say: The plaintiff in writing offered defendant that if defendant would submit to the plaintiff samples of choice Cosumnes hops grown in the State of California in the year 1912, of such character and quality as the defendant would be willing to accept, the plaintiff would procure and sell and deliver to the defendant two thousand bales of choice Cosumnes hops equal in all respects [29] to the samples so to be presented and submitted by the defendant to the plaintiff; that the defendant accepted the last mentioned offer and did in accordance with said acceptance present and submit to the plaintiff samples of choice Cosumnes hops which it had procured elsewhere, and informed plaintiff in writing that it would be willing to accept and purchase and pay for two thousand bales of choice Cosumnes hops from the defendant if the same were in all things equal in quality to the samples so submitted by defendant to plaintiff; that the plaintiff never did procure or offer or deliver to the defendant any choice Cosumnes hops or any hops equal in quality to the samples submitted by defendant to plaintiff as aforesaid, and has never at any time delivered or offered to deliver any choice Cosumnes hops of the crop of 1912, or any hops of the crop of 1912.

#### II.

That the only contract or contracts ever made between the plaintiff and defendant in relation to the two thousand bales of Cosumnes hops mentioned in the plaintiff's complaint is and are the offers and acceptances mentioned in Paragraph I of this defense as modified as in said Paragraph I of this defense alleged.

#### III.

Defendant denies that thereafter, in the year 1912, or at any time, the plaintiff offered or tendered two thousand bales of Cosumnes hops of the crop of 1912, or any hops, to defendant; and defendant has no knowledge or information upon the subject sufficient to form a belief as to the allegation that in the year 1912 plaintiff did procure said two thousand bales of Cosumnes hops of the said crop of 1912, and placing its denial upon that ground, defendant denies the last-mentioned allegation; [30] and defendant alleges that if the plaintiff did procure two thousand bales of Cosumnes hops of the crop of 1912, the same were not procured in accordance with the terms or provisions of any contract or agreement with the defendant.

## IV.

Defendant denies that the plaintiff performed or offered to perform all or any acts, conditions or things on its part to be performed in accordance with any contract or agreement with the defendant, and denies that defendant neglected or refused to do and perform any conditions on its part.

#### V.

Defendant denies that by any failure or refusal on the part of defendant to accept, receive or pay for any hops mentioned in the complaint, the plaintiff has been damaged in the sum of Thirty-two Thousand (32,000) Dollars, or at all.

#### SECOND.

Defendant by way of counterclaim and cause of action against the plaintiff, alleges:

#### I.

Defendant at all the times mentioned herein was and now is a corporation organized and existing under the laws of the State of Wisconsin, and plaintiff at all the times mentioned herein was and it now is a corporation organized and existing under the laws of the State of New Jersey.

#### II.

Between the month of August, 1911, and the month of October, 1912, the plaintiff contracted and agreed with defendant that if defendant would procure and submit to the plaintiff samples of choice Cosumnes hops grown in the State of California [31] in the year 1912, the plaintiff would sell and deliver to the defendant two thousand bales of choice Cosumnes hops grown in the State of California in the year 1912 equal in all respects to the samples so to be presented and submitted by the defendant to plaintiff, and that plaintiff would deliver the said two thousand bales of hops to the defendant f. o. b. cars in the State of California at the price of twenty

cents a pound; that thereupon defendant did procure and submit to the plaintiff samples of choice Cosumnes hops grown in the State of California in the year 1912, and requested and demanded of the plaintiff that plaintiff deliver to the defendant two thousand bales of Cosumnes hops grown in the State of California in the year 1912, equal in all respects to the samples so presented and submitted, but plaintiff broke its said contract and failed and refused to deliver the same to defendant and did not at any time deliver to plaintiff two thousand bales of Cosumnes hops grown in the State of California in the year 1912 equal in all respects or in any respect to the samples so submitted as aforesaid, and did not deliver the same, or any hops, to defendant on cars in the State of California, or at any place, or at all

#### III.

By reason of plaintiff's breach of the said contrary defendant has been damaged in the sum of Twenty-five Hundred (2500) Dollars.

WHEREFORE, this defendant prays judgment against plaintiff:

- 1. That plaintiff take nothing by his said action against the defendant;
- 2. That the defendant recover against the plaintiff its damages in the sum of Twenty-five Hundred (2500) Dollars; [32]
- 3. That the defendant recover its costs against the plaintiff.

HELLER, POWERS & EHRMAN,
Attorneys for Defendant.

State of California,

City and County of San Francisco,—ss.

Frank H. Powers, being duly sworn, deposes and says: That he is an attorney at law and a member of the firm of Heller, Powers & Ehrman, who appear in this action as attorneys for the defendant in the foregoing answer; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true;

That the reason this verification is not made by the defendant is that the defendant is a corporation having its office and principal place of business in the State of Wisconsin, and that none of the officers of said defendant who are familiar with the facts in said action are in the State of California where affiant resides.

## FRANK H. POWERS.

Subscribed and sworn to before me this 22d day of September, 1913.

[Seal]

LYDA COHN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sep. 23, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [33]

In the District Court of the United States, in and for the Northern District of California, Second Division.

(Removed from the Superior Court of the County of Sacramento, State of California.) No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

#### Demurrer to Answer and Counterclaim.

Comes now the plaintiff in the above-entitled action, and demurs to the answer of the defendant to the complaint of the plaintiff upon the ground that said answer does not state facts sufficient to constitute an answer to the complaint of the plaintiff, or a defense to the cause of action therein alleged.

And said defendant demurs to the alleged counterclaim and cause of action set out in said answer upon the ground that said alleged counterclaim does not state facts sufficient to constitute a counterclaim or cause of action against said plaintiff.

WHEREFORE, said plaintiff prays that this demurrer be sustained and that it have judgment as prayed for in its complaint.

W. H. CARLIN,
DEVLIN & DEVLIN,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 29, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [34]

At a stated term, to wit, the November term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 1st day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, designated to hold and holding this court; the Honorable WILLIAM C. VAN FLEET, District Judge, and the Honorable MAURICE T. DOOLING, District Judge.

No. 15,678.

E. CLEMENS HORST CO.

VS.

PABST BREWING CO.

# Order Withdrawing Demurrer to Answer and Motion to Strike Out Parts.

Ordered that the demurrer to answer and motion to strike out parts be withdrawn by request on behalf of plaintiff. [35]

In the District Court of the United States, in and for the Northern District of California, Second Division.

(Removed from the Superior Court of the County of Sacramento, State of California.)

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

#### Answer to Counterclaim.

Comes now the plaintiff in the above-entitled action, and answering the alleged counterclaim and cause of action set forth by the defendant in said action, in its answer to the complaint of the plaintiff therein, denies and avers as follows:

I.

Denies that between the month of August, 1911, and the month of October, 1912, or at any other time, the plaintiff contracted and agreed, or contracted or agreed, with defendant that if defendant would procure and submit, or procure or submit, to plaintiff, samples of choice Cosumnes hops or any hops grown in the State of California or elsewhere, in the year 1912, or at any other time, the plaintiff would sell and deliver, or sell or deliver, to the defendant two thousand (2,000) bales of choice Cosumnes hops or any hops grown in the State of California, or elsewhere, in the year 1912, or at any other time, equal in all

respects to any samples to be presented or submitted by defendant to plaintiff, and denies that at said time, or at any other time, plaintiff contracted or agreed with defendant that it would deliver the said two thousand (2,000) bales of hops, or any bales of hops, to the defendant f. o. b. cars in the State of California, or elsewhere, at the price of twenty cents (20e)per pound or any other price. [36] Admits that during the year 1912 defendant did submit to plaintiff samples of certain hops, but denies that said defendant requested and demanded, or requested or demanded, of plaintiff that plaintiff deliver to defendant two thousand (2,000) bales of Cosumnes hops or any hops grown in the State of California or elsewhere, in the year 1912, equal in all or any respect to samples presented and submitted by defendant to plaintiff, and in that connection plaintiff denies that it ever at any time entered into any contract with regard to any hops, with defendant, save and except the contract declared upon and alleged in its complaint herein, and further alleges that during the year 1912, plaintiff proposed and offered to sell to defendant two thousand (2,000) bales of hops equal in all respects to the said samples so presented and submitted to it by defendant, and that defendant rejected said offer and proposal, and that the same was not accepted by defendant, and that no contract or agreement with regard thereto was made or consummated between plaintiff and defendant. Denies that plaintiff broke any contract whatsoever between it and defendant, and denies that it refused at any time to deliver any hops to defendant.

#### II.

Denies that by reason of plaintiff's breach of any contract between plaintiff and defendant, defendant has been damaged in the sum of Twenty-five Hundred Dollars (\$2,500.00), or in any sum whatsoever.

WHEREFORE, plaintiff prays that the prayer of defendant's answer be denied, and that it have judgment as prayed for in its original complaint herein.

W. H. CARLIN,
DEVLIN & DEVLIN,
WM. H. DEVLIN,
Attorneys for Plaintiff. [37]
VERIFICATION.

State of California, County of Sacramento,—ss.

E. C. Horst, being first duly sworn, on oath deposes and says he is an officer, to wit, president of the corporation plaintiff in the within entitled proceeding, and makes this affidavit on its behalf, and that he has read the foregoing and annexed answer, and knows the contents thereof, and that the same is true of his own knowledge except as to such matters as are therein stated upon information and belief, and as to such matters, he believes it to be true.

E. C. HORST.

Subscribed and sworn to before me, this 26th day of November, 1913.

[Seal] R. B. TREAT,

Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Dec. 1, 1913. W. B. Maling, Clerk. [38]

At a stated term, to wit, the April term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the city of Sacramento, on Thursday, the 16th day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,678.

E. CLEMENS HORST CO.

VS.

PABST BREWING CO.

[Order Granting Leave to Plaintiff to File Amendments to Complaint.]

Upon motion of Mr. Devlin, it was ordered that plaintiff be, and it is hereby, granted leave to file amendments to complaint herein.

[39]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

## Amendments to Complaint.

The above-named plaintiff, by leave of Court first had and obtained, files the following amendments to its complaint:

#### I.

After the word "of," in line 25 of page 1, add the following: "choice, air-dried."

#### II.

After the word "of" where it first occurs, in line 31 of page 1, add the following: "choice, air-dried."

#### III.

Strike out commencing with the word "card," in line 22 of page 1, and ending with the word "California," in line 22 of same page, and in lieu thereof insert "cars in Milkaukee, Wisconsin, plus freight."

## IV.

After the word "and," in line 28 of page 1, insert "on or."

## V.

Strike out the word "first," in line 28 of page 1, and in lieu thereof insert "twenty-eight."

## VI.

After the word "of," in line 24 of page 1, insert "choice air-dried." [40]

## VII.

Strike out the word "full," in line 1 of page 2, and insert "fulfillment thereof."

## VIII.

After the word "thereof," in line 4 of page 2, add the following: "That during the month of November, 1912, the said defendant, in writing, notified

the plaintiff that it renounced and repudiated the said contract, and did not, at any time, withdraw the same."

Dated April 16th, 1914.

W. H. CARLIN and DEVLIN & DEVLIN, Attorneys for Plaintiff.

State of California, County of Sacramento,—ss.

E. C. Horst, being first duly sworn, on oath deposes and says he is the president of E. Clemens Horst Company (a corporation), the plaintiff in the within entitled proceeding, and that he has read the foregoing and annexed amendments to complaint, and knows the contents thereof, and that the same is true of his own knowledge except as to such matters as are therein stated upon information and belief, and as to such matters, he believes it to be true. That he makes this verification for and on behalf of said corporation.

E. C. HORST.

Subscribed and sworn to before me, this 15th day of April, 1914.

[Seal] C. S. WOODWORTH,

Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed April 16th, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy. [41]

At a stated term, to wit, the April term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the city of Sacramento, on Tuesday, the 21st day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,678.

E. CLEMENS HORST CO.,

VS.

PABST BREWING CO.

Order Allowing Plaintiff to File Amended Complaint.

On motion of Mr. Devlin, it was ordered that plaintiff be, and is hereby, allowed to file an amended complaint. [42]

In the District Court of the United States, in and for the Northern District of California, Second Division.

(Removed from the Superior Court of the County of Sacramento, State of California,)

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation, Defendant.

## Amended Complaint.

Comes now the plaintiff by leave of the Court first had and obtained, and amends the complaint by amending the prayer thereof so as to read as follows:

WHEREFORE, plaintiff prays judgment of the court against defendant in the sum of Thirty-two thousand Dollars (\$32,000.00), and interest thereon at the rate of seven per cent per annum from the first day of March, 1913, to entry of judgment, and also for its costs of suit and such other, further or different relief as may be meet and proper.

DEVLIN & DEVLIN, Attorneys for Plaintiff.

[Endorsed]: Filed April 21st, 1914, W. B. Maling, Clerk. By J. A. Schaertzer, Deputy.

Personal service hereof by copy admitted this 20th day of April, 1914.

HELLER, POWERS & EHRMAN,
Attorneys for Deft. [43]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

## Verdict.

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Twenty-two Thousand Six Hundred and Twenty-five 30/100 Dollars (\$22625 30/100).

S. B. SMITH,
Foreman.

[Endorsed]: Filed April 29, 1914, W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [44]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

## Judgment on Verdict.

This cause having come on regularly for trial on the 16th day of April, 1914, being a day in the April, 1914, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; Robert T. Devlin, M. E. Harrison and S. T. Jeffries, Esqrs., appearing as attorneys for the plaintiff and Frank H. Powers, Esq., and Messrs. Butler and Swisler, appearing as attorneys for the defendant, and the trial having been proceeded with on the 17th, 21st, 22d, 23d, 24th, 27th,

28th and 29th days of April, all in said year and term, and evidence oral and documentary upon behalf of the respective parties having been introduced and closed, and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely; "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Twenty-two Thousand Six Hundred Twenty-five 30/100 Dollars (\$22,625 30/100) S. B. Smith, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the E. Clemens Horst Company, a corporation, plaintiff, do have and [45] recover of and from the Pabst Brewing Company, a corporation, defendant, the sum of Twenty-two Thousand Six Hundred Twenty-five and 30/100 (\$22,625.30) Dollars, together with its costs in this behalf expended taxed at \$252.80.

Judgment entered April 29, 1914.

WALTER B. MALING,

Clerk.

By J. A. Schaertzer, Deputy Clerk.

A true copy. Attest:

[Seal] WALTER B. MALING,

Clerk.

By J. A. Schaertzer, Deputy Clerk. [Endorsed]: Filed April 29, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [46]

In the District Court of the United States, for the Northern District of California.

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation, vs.

PABST BREWING COMPANY, a Corporation,

# Clerk's Certificate to Judgment-roll.

I, W. B. Maling, clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 29th day of April, 1914.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed April 29th, 1914. Walter B. Maling. By J. A. Schaertzer, Deputy Clerk. [47]

# [Bill of Exceptions.]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

BE IT REMEMBERED that on the 16th day of April, 1914, the above-entitled action came on for trial in the above-entitled court before Hon. Wm. C. Van Fleet, presiding, and a jury, Messrs. Devlin & Devlin and W. H. Carlin, Esq., appearing as attorneys for plaintiff, and Heller, Powers & Ehrman, appearing as attorneys for defendant, with Butler & Swisler of counsel. After the jury was impanelled the following proceedings were had and testimony introduced and the same constitutes all the testimony given to the jury.

Robert Devlin, Esq., made a statement of plaintiff's intention to prove; thereupon Mr. Devlin offered and read in evidence the following papers:

## NIGHT LETTER.

"San Francisco, Aug. 21st, 1911.

# PABST BREWING CO.,

Milwaukee, Wis.

We offer you for immediate or later shipment subject to your telegraphic acceptance tomorrow and our

confirmation of sale one thousand bales new crop choice brewing air dried coast hops at forty cents plus freight account heavy buying for England and other foreign countries our market is active and advancing [48] fast.

E. CLEMENS HORST CO.

Charge E. C. H. Co."

TELEGRAM.

149Ch. e. 18.

Milwaukee, Wis., August 22, 1911.

E. Clemens Horst Co.

San Francisco.

Provided section from which you propose furnishing satisfactory offer forty cents Milwaukee five hundred bales strictly choice deliver.

PABST BRG. CO.

906 AM.

## DAY LETTER.

S. F. Aug. 24/11.

# PABST BREWING CO.,

Milwaukee, Wisc.

We confirm sale five hundred bales air dried Cosumnes elevens at forty cents delivered for shipment August December inclusive period we offer thousand air dried Cosumnes Twelves at Twenty plus frieght period please wire when interested more elevens.

## E. CLEMENS HORST CO.

Charge E. C. Horst Co.

W. U. T. Co.

#### TELEGRAM.

Copy.

Milwaukee Wis. August 25, 1911.

#### E. CLEMONS HORST CO.

San Francisco, Cal.

Will take thousand bales Cosumnes twelve strictly choice quality twenty cents fob milwaukee

PABST BREWING CO.

330 PM. [49]

#### NIGHT LETTERGRAM.

San Francisco, August 25, 1911.

## PABST BREWING CO.,

Milwaukee, Wis.

We offer one thousand bales twelve choice air dried Cosumnes delivered Milwaukee at twenty cents plus freight this is positively best we can do we expect twelves to run about thirty cents coast period referring our todays telegram please rush guarantee to bank here and also please telegraph bank guaranteeing payment our drafts against warehouse receipts or ladings for sixty eight and two fifths cents bushel on two hundred thousand contract August fifteenth also seventy nine and one fifth cents bushel on fifty thousand chevelier also eighty one cents bushel on ten thousand moravian.

E. CLEMENS HORST CO.

Charge ECH. Co.

#### DAY LETTER.

Milwaukee, Wis., Aug. 26, '11.

## To E. C. HORST CO.

San Francisco, Cal.

We accept offer one thousand bales choice cosum-

nes air dried nineteen twelve crop twenty cents fob period have wired bank California guaranteeing your drafts on us as requested period all drafts so far paid by us have only warehouse receipts attached how about the hundred thousand shipments you agreed to make this month we need the barley answer.

PABST BREWING CO.

11.33 A. M.

#### TELEGRAM.

San Francisco, Augst 29, 1911.

# PABST BREWING CO., [50]

Milwaukee, Wis.

We confirm sale to you of another one thousand bales choice nineteen twelve crop cosumnes at twenty cents delivered Milwaukee plus freight charges making total sales to you of nineteen twelve crop two thousand bales what is best price you will entertain on five or thousand bales same quality eleven crop.

E. CLEMENS HORST CO.

## TELEGRAM.

Milwaukee, Wis., August 28, 1911.

## E. CLEMENS HORST CO.

San Francisco.

We accept your offer one thousand bales strictly choice Cosumnes nineteen twelve crop at twenty cents fob please confirm.

PABST BREWING CO.

222 P. M.

#### NIGHT LETTERGRAM.

San Francisco, August 27, 1911.

## PABST BREWING CO.,

Milwaukee, Wis.

We confirm sale to you of one thousand bales nine-teen twelve crop Choice air dried cosumnes delivered at Milwaukee at twenty cents plus freight from Coast period. This in accordance with our telegraphic offer of the twenty fifth period. Offer you additional thousand bales at same price also offer you subject our confirmation of sale of sale additional thousand bales eleven crop at forty cents delivered at Milwaukee freight paid period. Our offer on twelve crop from your stand point is exceptionally low one period. As our sales of twelve crop increase will increase price accordingly only able to make you this low offer because of our unsold surplus.

E. CLEMENS HORST CO.

Charge E. C. H. Co. [51]

Sept. 1st, 1911.

In reply refer to S-39796. PABST BREWING CO.,

Milwaukee, Wis.

## Gentlemen:-

We have just discovered that we inadvertently overlooked confirming our night lettergram to you of August 29th, as follows:

"We confirm sale to you of another one thousand bales choice nineteen twelve crop Cosumnes at twenty cents delivered Milwaukee plus freight charges making total sales to you of nineteen twelve crop two thousand bales What is best

price you will entertain on five hundred or thousand bales same quality eleven crop."

We feel satisfied that both of your contracts for 1912 crop Hops at 20¢ plus freight from the Coast will prove a most profitable investment to you, and we assure you that your order is appreciated and will receive our most careful attention.

Yours faithfully, E. CLEMENS HORST CO.,

TBS/J

## NIGHT LETTERGRAM.

San Francisco, Sept. 27, 1912.

# PABST BREWING CO.,

Milwaukee, Wis.

Mr. George wires us you are now negotiating resale to other dealers of the two thousand bales Cosumnes we sold you and that you wish all these Hops held on Coast until you order hops forwarded period We are willing hold these hops on coast if you accept deliveries now on coast less freight allowance period we are willing resell the two thousand bales for your account or we are willing to exchange all or part for nineteen twelve Oregons or Yakimas at difference in price or we are willing make term contract for Yakimas and cancel sale Cosumnes twelves period You can appreciate that we must know your conclusions now so we can complete our nineteen twelve deliveries to other buyers please wire us fully direct to Sanfrancisco period. We do not think you can rush sale of two thousand Cosumnes as all big deals at present are for Oregons for export.

E. CLEMENS HORST CO. [52]

Charge E. C. H. Co.

154 words.

San Francisco, October 15, 1912. In Reply refer to S-55,445.

## PABST BREWING CO.,

Milwaukee, Wis.

Gentlemen:-

We confirm interchange of telegrams with you today, as follows:

Received from you-

"Must see samples Cosumnes deliveries you can make equal four samples mailed you as we expect to dispose of same on coast."

Sent to you—

"If you wire you will accept hops equal samples you sent we will arrange accumulate such hops for you but we cannot submit you further samples without we buy hops and we cannot buy and increase our stocks unless you wire you will accept hops equal your samples period. In replying please answer yesterdays inquiry from whom your samples received period. We offer our best services for resale of any hops you do not require."

Yours faithfully, E. CLEMENS HORST CO.,

TBS-PK.

Thereupon the following witnesses were sworn on behalf of plaintiff and testified as follows:

## [Testimony of E. Clemens Horst, for Plaintiff.]

E. CLEMENS HORST, direct examination by Mr. Devlin:

I am a hop grower and dealer and have been engaged as a grower for fifteen years and as a dealer for the last twenty-five years, and have bought and sold and raised hops and am familiar with the terms and usage of the trade and have sold hops all over the world.

In 1912, I was engaged in raising hops in what is known as the Cosumnes River District in Sacramento County, and have been thus engaged for about nine years. [53]

I have about four hundred acres under cultivation.
The Cosumnes District consists of about eight or nine hundred acres along the Cosumnes River in Sacramento County.

There are other districts in Sacramento County, such as American River and Sacramento River District, also Yolo County District.

Those that are grown along the Sacramento River are called "Riverside."

There is also Yuba District, Tehama District, Russian River District.

Yakima hops are grown in Yakima County and there are also Oregon hops.

I am familiar with the crop that grew on my place in the year 1912 and saw the bales.

We sent samples to the Pabst Brewing Company taken from our 1912 crop.

Air-dried as used in the contract between Pabst

Brewing Company means hops that are dried by forced air. They are distinguished from the kiln dried hops.

In the kiln dried the heat is inside and comes from a stove in the building, and in the air dried, the air is warmed outside of the building and blown in there.

There is a distinction in quality between the hops because the air-dried hops retain the oils and resins better than the kiln-dried hops.

That is supposed to be an advantage.

The hops raised on our place in 1912 were air-dried hops and no one else in that section of the country dried hops by the air drying process, except plaintiff.

We raised something over 4500 bales that year.

We divided the hops into two classes. [54]

The hops are all picked by machinery and certain hops called clean-ups in the regular process of picking accumulate around the plant and they are kept separate. There was about 150 bales of clean ups and about 4350 bales of choice hops.

Clean-up hops are broken up in the process of picking and accumulate during the day.

We put the clean-ups in separate bales that year.

Q. I will ask you whether or not that is the practice of hop growers, or whether you did this yourself, and it is an exception to the rule?

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial.

The COURT.—Objection overruled.

## Exception #1.

A. The custom is to have all the hops together.

The general practice is to have all of the hops together, but we made an exception to that practice in 1912 Cosumnes crop. As to the 4300 bales or thereabouts, they were choice.

- Q. What is generally understood in the hop trade as choice hops?
- A. The best mean average quality of the district. The hops were clean picked, well cured and had no defect such as rust or mould.
- Q. Is there a practice or usage among hop buyers and hop dealers as to the delivery of hops when no time is specified?

Mr. POWERS.—We object to that question and move that the answer be stricken out. We object on the ground that it is irrelevant, incompetent and immaterial, unless it be shown that the custom is universal.

The COURT.—Objection overruled.

A. Yes.

Q. In other words whether there is known as a hop season? A. Yes.

Mr. POWERS.—Exception.

## **Exception #2.** [55]

The COURT.—Taking as an illustration the alleged contract here, having reference to the hops of 1912, the contract calling for the delivery of hops of that year, what is the customary understanding as to the time of delivery where it is not there specified?

A. To ship them during the so-called shipping season, of that year, which would be from the time

of the harvest up to the end of February or perhaps March of the following year.

Q. If no time is specified in the contract for the delivery of hops where the hops are to be of a subsequent year's growth, is there any practice or usage in the trade whereby the seller will have to the end of the shipping season, or if not, what time is he to fulfill the contract for the delivery of those hops?

Mr. POWERS.—We object as irrelevant, incompetent and immaterial and on the ground that it is assumed that there is such a custom universal among hop dealers.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

### Exception #3.

A. The seller has until the end of the shipping season to make his delivery or shipment.

We did not deliver the 2,000 bales of hops.

I submitted them samples at their request. They telegraphed back and rejected the samples, saying that the samples were not choice, and I telegraphed back.

Mr. DEVLIN.—We offer in evidence a night letter dated November 4th, 1912, addressed by the Pabst Brewing Company to Horst Company: [56]

POSTAL TELEGRAPH-CABLE COMPANY.
NIGHT LETTERGRAM.

777CH A 34 NL

Milwaukee Wis Nov. 4, 12.

E. Clemens Horst Co.

San Francisco.

Cannot accept samples as they are not according

to choice quality specified in contract we herewith cancel contract for two thousand bales entered into with you because of your inability to comply with specifications.

#### PABST BRG CO.

725 P.

Mr. DEVLIN.—We offer in evidence night letter sent by Horst Company to the Pabst Brewing Co., dated November 5th, 1912:

# POSTAL TELEGRAM CABLE COMPANY. NIGHT LETTERGRAM.

San Francisco, Nov. 5/1912.

Pabst Brewing Co.,

Milwaukee, Wis.

Replying to your yesterdays wire received to-day we disagree with your comments on quality of samples sent you and to your statement that we are unable to comply with our contracts with you Please wire us in what respects you claim samples twenty five to thirty eight inclusive to be below contracted quality and whether you claim none of all samples sent you is equal contracted quality Please also wire whether you will pay us decline in market if we consent cancellation two thousand bale sale we cannot release contracts without proper settlement we suggest that our letter October eighteenth offers fairest method of adjusting matter We are willing submit further samples and are willing that Chief Inspector of San Francisco Chamber of Commerce or other high class [57] competent disinterested parties to be agreed upon shall pass upon quality.

E. CLEMENS HORST CO.

Charge E.C.H. Co.

137 Words.

Mr. POWERS.—We object on the ground that this is an attempt at compromise and is not admissible in evidence.

The COURT.—Objection overruled.

Mr. POWERS.—Exception. Exception noted.

### Exception #4.

Mr. DEVLIN.—We offer in evidence the following letters:

#### DAY LETTER.

WESTERN UNION TELEGRAPH COMPANY.

Received at S. E. Cor. Pine and Montgomery Sts., San Francisco.

W 1071 CH UN 93 Blue

Milwaukee Wis. Nov. 7, 1912.

E. Clemens Horst Co.,

San Francisco.

Samples we sent you represent choice quality consumnes which our contract specifies and to which none of your samples compare period our judgment and experience sufficient to warrant our action in cancelling contract because of insufficient quality samples submitted by you period have partially covered quality at higher than our contract price with you because of our rejection therefore will not entertain suggestion to pay you difference period will not have further discussion on this and if you consider our action arbitrary take such action as

(Testimony of E. Clemens Horst.) you may deem best for your interest.

PABST BRG. CO. 11:40 A. M.

### NIGHT LETTER.

S. F. Nov. 7, 12. [58]

Pabst Brewing Co.,

Milwaukee, Wisc.

We cannot possibly realize anything like contract price for any Coast Hops regardless quality and with present weak and declining market and big American Hop surplus it is impossible to find buyers for Two Thousand bales except at big sacrifice from present low prices period we respectfully repeat our request that you specify in what particulars samples last sent are claimed below contract requirements we will then without prejudice our rights submit further samples of contracted quality satisfactory to your period we repeat our offer to arbitrate period if you decline abitrate we hope you will co-operate with us to adjust differences.

### E. CLEMENS HORST CO.,

Charge

E. Clemens Horst Co.

via W. U. T. Co.

Mr. POWERS.—We object as argumentative and as a self serving declaration anticipatory of a law suit and an offer of a compromise, and as irrelevant, incompetent and immaterial.

The COURT.—Objection overruled. Exception noted.

Exception 5.

San Francisco, November 8, 1912.

In reply refer to H-55804.

PABST BREWING CO.,

Milwaukee, Wis.

Gentlemen:-

We confirm interchange of telegrams with you, as follows:—

Received from you November 7th—(Day Letter)

"Samples we sent you represent choice quality Cosumnes which our contract specifies and to which none of your samples compare period Our judgment and experience sufficient to warrant our action in cancelling contract because [59] of our rejection Therefore will not entertain suggestion to pay you difference period Will not have further discussion on this and if you consider our action arbitrary take such action as you may deem best for your interests."

Sent to you November 7th—(Night Letter)

"We cannot possibly realize anything like contract price for any Coast hops regardless quality and with present weak and declining market and big American hop surplus it is impossible to find buyers for two thousand bales except at big sacrifice from present low prices period. We respectfully repeat our request that you specify in what particulars samples last sent you are claimed below contract requirements we will then without prejudice our rights submit further samples of contracted quality satisfactory to you period. We repeat

our offer to arbitrate period If you decline arbitrate we hope you will co-operate with us to adjust differences."

Yours faithfully,
E. CLEMENS HORST CO.
E. C. HORST, Pres.

ECH/PK

San Francisco, November 12, 1912.

In reply refer to H— 57411

PABST BREWING COMPANY,

Milwaukee, Wis.

Gentlemen:-

We confirm telegrams with you today, as follows: Sent to you—

"Received no reply wire November seventh would appreciate reply."

Received from you—

"Our day letter seventh fully states our position."

Sent to you—"(Night Letter)

"We understand from previous correspondence that you will not accept deliveries equal to any of the samples in the two lots of samples we sent you and that you will not consider any further samples we may submit you for delivery and that you will not accept any deliveries from us and that you will not arbitrate period. Upon receipt of your confirmation of your above position we will not trouble you with further communications except by your request though we would appreciate [60] personal interview

later on with a view of adjusting matters."

Your faithfully,

E. CLEMONS HORST CO.,

ECH/PK

E. C. HORST, Pres.

Note: Postal Tel. Co. phoned Nov. 13/12 in reference to this wire, said that Pabst had sent a query as to whether the word "in" in the second line should be "of." I answered telegram correct as sent.

Nov. 13/12.

Mr. DEVLIN.—I also introduce the following telegrams:

PABST BREWING COMPANY.

Milwaukee, Wis. Oct. 4th, 1912.

E. C. Horst Co.,

San Francisco, Cal.

Gentlemen:-

Your valued favor of the 28th ult., at hand and contents noted. Have also received the line of samples of Consumnes hops, which should represent our order of 2000 bales for this season, but are sorry to state that after very close inspection it will be impossible for us to accept hops of this nature on our contract, as same are not choice.

Yours truly,

PABST BREWING COMPANY.

CZ-M

By C. Z.

TELEGRAM.

San Francisco, Oct. 9th, 1912.

PABST BREWING CO.,

Milwaukee, Wis.

Please wire our expense wherein you claim samples submitted are below quality sold we are anxious do everything to meet your wishes.

E. CLEMENS HORST CO.

Charge E. C. H. Co.

22 words. **[61]** 

#### NIGHT LETTERGRAM.

San Francisco, Oct. 9, 1912.

PABST BREWING CO.,

Milwaukee, Wis.

Referring your todays wire please send us line of samples of such cosumnes hops as you will accept.

E. CLEMENS HORST CO.

Chge. E. C. H. Co.

TELEGRAM.

516 chwx 29.

Milwaukee, Wis. Oct. 9/12.

E. CLEMENS HORST CO.

San Fran.

Answering your telegram ninth color shows no life picking poor flavor and substance of samples submitted by you in no way compare with other choice consumnes submittes by others.

PABST BRG. CO. 136 P.

#### PABST BREWING COMPANY.

Milwaukee, Wis., October 10th, 1912.

### E. CLEMENS HORST CO.

San Francisco, Cal.

Gentlemen:-

In reply to your telegram of to-day, we beg to state that we have forwarded your four samples of choice Cosumnes hops.

Kindly compare these with your samples, and oblige,

Yours truly,

PABST BREWING COMPANY.

CZ-M.

By CZ. [62]

#### NIGHT LETTERGRAM

San Francisco, October 14, 1912.

#### PABST BREWING CO.,

Milwaukee, Wis.

Have received from you two of four samples advised in your letter October tenth please wire us that you will accept deliveries equal to those four samples and we will try arrange deliveries accordingly and if you wil please wire us from whom you received the four samples you sent us we will try to purchase the identical lots for deliveries to you.

E. CLEMENS HORST CO.

Chge. E. C. H. Co.

63 words.

#### NIGHT LETTERGRAM.

San Francisco, October 15, 1912.

### PABST BREWING CO.,

Milwaukee, Wis.

If you wire you will accept hops equal samples you sent we will arrange accumulate such hops for you but we cannot submit you further samples without we buy hops and we cannot buy and increase our stocks unless you wire you will accept hops equal your samples period in replying please answer yesterday's inquiry from whom your samples received period we offer our best services for resale of any hops you do not require.

E. CLEMENS HORST CO.

Chge. E. C. H. Co.

#### DAY LETTER.

W. 1095 CH FS CX 22 Blue.

Milwaukee, Wis., Oct. 15-12.

E. CLEMENS HORST CO.

San Francisco, Calif. [63]

Must see samples consumnes deliveries you can make equal four samples mailed you as we expect to dispose of same on coast.

PABST BRG. CO. 12 10 PM.

Mr. DEVLIN.—I offer the following letters:

San Francisco, Oct. 18th, 1912.

In reply refer to H-53959.

PABST BREWING CO.,

Milwaukee, Wis.

Gentlemen:-

We are without answer from you to our wire of Oct. 15th.

As you will not take the 2000 bales of Hops sold you on quality equal to any of the 20 samples we sent you, nor commit yourselves to take any Hops equal to the four samples you sent us, we feel the fair plan that should be most suitable to you will be to agree upon a difference in price to be paid us on the 2000 bales.

To arrive at that amount, we should get, if market had not changed, the fair profit as between simultaneous buying and selling prices, and as market has declined we should get in addition, the decline in the matket, but if you think that this is asking too much we are ready to accept, subject to our confirmation within three business days after receipt of your reply, whatever may be the difference between the contract price and any figure you may offer us now on 2000 bales 1912 Hops equal to the four samples you sent us, or to the selection of the 20 we sent you. The new offer to be made on basis of delivery in lot or lots at seller's option during October to February inclusive, and official inspection of the San Francisco Chamber of Commerce, or other inspection to be mutually agreed upon, to be final.

Or if you prefer to delay the fixing of price on above plan, we are willing that you pay us the difference as of a later date plus what would be the carrying charges on 2000 bales Hops, which we estimate to amount to about \$750.00 per month covering interest, storage, insurance and loss in weight. The delay in delivery has already entailed a loss of

(Testimony of E. Clemens Horst.) \$1000.00 on such charges, but we are not asking you to make good that \$1000.00.

On our above plan you cannot increase your losses nor your hop stocks, because if we accept the price you offer on the new 2000 bale deal you will not have increased your stocks, as our aceptance of your offer will have cancelled the old deal and the new price you offer will be used as a basis for our arriving at the amount of money you should pay us by reason of cancellation of your present contract.

We have made our suggestion for the new offer to buy 2000 bales simply so you do not wire us a too high price for basis of adjustment. [64]

You no doubt realize that 2000 bales Hops is an enormous block of Hops to sell at any time of the year and at a time as late as this it is always much harder to sell Californian Hops and there is an enormous difference between the price at which anyone in the Hop business would buy 2000 bales and the price at which he would sell 2000 bales, unless, of course, the purchase was being made without speculation against a concurrent sale or offer.

In order to realize anything like current prices for Hops they have to be peddled at enormous selling costs and we really do not know how long it will take us to sell elsewhere 2000 bales Californian Hops so late in the season, but we want to help out all that is possible.

We made you a number of offers to change your purchases to Sonomas, Oregons, Washingtons, Yakimas, States of foreign 1912's or to change from

1912's to future years, all at fair price differences to be agreed upon, but regret that these suggestions, as well as our offers, both before and since the harvest, to resell for your account your 2000 bales purchased were all declined.

We are desirous of impressing upon you that we do not wish the slightest advantage by reason of your change of mind on your Cosumnes Hop Purchases, but we do ask your consideration for a prompt and fair adjustment of the matter and we hope our above suggestion will meet your approval.

No doubt you realize that your publishing the fact that you will not use Cosumnes Hops greatly depreciates their market value and the greater such depreciation the greater your loss, and, therefore, it is far better in both your interest and ours that the market value of the Cosumnes Hops be maintained.

There are plenty of brewers that are having successful results with our Cosumnes Hops and it does not pay to influence their minds against them.

Faithfully,
E. CLEMENS HORST CO.
E. C. HORST,

Pres.

ECH/J. [65]

Referring to telegram of October 9th, 1912, addressed to E. Clemens Horst by the Pabst Brewing Company, I saw the samples referred to in that telegram for the purpose of ascertaining and knowing their quality.

With reference to the expression "color shows no

life," I wish to say that the color of these samples was all right. They were cleanly picked, the flavor was all right, it was good flavor.

Q. Will you state whether or not the hops that you grew on your place in 1912, were or were not choice air-dried Cosumnes hops?

Mr. POWERS.—That is objected to as irrelevant, incompetent and immaterial unless connected with the defendant.

The COURT.—They are connecting the hops with the defendant as fast as they can. If they do not finally succeed in doing it, then you may strike this testimony out.

A. Yes.

Q. State whether you were able or not to deliver out of the 4300 bales you have specified, the 2000 bales of hops for the purpose of filling this contract for the Pabst Brewing Company?

Mr. POWERS.—That is objected to as irrelevant, incompetent and immaterial.

The COURT.—Of the quality which the contract called for?

Mr. POWERS.—That is objected to as irrelevant, incompetent and immaterial, and not connected with this defendant. [66]

The COURT.—Objection overruled. Exception. Mr. POWERS.—Exception.

### Exception #6.

A. Yes. The samples sent to them were choice air-dried Cosumnes hops and they were from these bales.

The COURT.—Mr. Horst, you observe that in the reading of the telegraphic communication constituting the alleged contract, that no reference is made to the submission of samples at all. How did you come to send these samples to them?

A. They asked that we send them samples after the trade was made. They told us they wanted to resell the hops. They were not going to use Cosumnes hops at all. They asked us to send samples.

- Q. Were you obligated under the cusoms of the trade, under a contract of that kind, to send samples?
  - A. No, sir.
  - Q. You then did it voluntarily?
- A. Yes. The trade customs do not call for it. In some cases the seller submits samples where he expects the hops are not going to be taken any way. The most of the hops of a given crop are sold before the harvest, contracted for in advance. There is no such place as a well-known hop market. There is no hop market at Milwaukee. The sales can be made anywhere.
- Q. Where are California hops grown on the coast generally sold and where are purchases made?
  - A. Where are the purchases made?
  - Q. Where are the contracts generally made?
  - A. They can be made anywhere.
- Q. Are you familiar with the prices that could be obtained or were obtained in November 4th, 1912, down to and including, say, the first day of March, 1913? A. Yes, sir.

Choice air-dried Cosumnes hops could not be sold

in that quantity at any price. Because the buying season is over about the middle of October, the beginning of October, the season is [67] practically over, and after that time it is simply a retail trade. I do not know just how many hops were left in the Cosumnes District at that time. I believe a few hundred bales were left over. Sacramento would be the nearest market, the most of the business would be done in Sacramento hops in Sacramento. It would not be possible to market that quantity of hops in Sacramento at that time at a profit. There is really no such thing as a market price for hops, because hops are sold on private contract, and are sold in advance.

Mr. DEVLIN.—I want to show if there was any market that Sacramento or San Francisco would be the place for the sale of the hops.

The COURT.—There is such a thing as the London market?

A. There is no market in London for Sacramento hops.

The COURT.—There are quotations in the paper of prices of hops on the London market and on the New York market.

The WITNES.—But not California hops. The London market handle a particular kind of hops.

The brewers in England and the trade in England buy a different character of hops. They buy very dry yellow hops that are grown in Oregon, in the Sonoma District, and in the Russian River District. They do not buy the class of hops grown in Sacra-

mento County. The Sacramento hop is like the hop grown in continental Europe, and when England buys hops, it buys what is known as the Oregon type. They are two entirely different types of hops.

Sacramento has a green hop and Oregon has a yellow hop.

The market was declining very rapidly from November 4th, down to and including the first day of March. [68]

It is not possible to sell 2000 bales of one kind of hops on a declining market. The market at the time after the same was made was roughly, twenty cents on contract price. From that price the market went up to about 28 cents, that was before harvest time. Then it went down until about the harvest time it was in the neighborhood of 17 or 18 cents, and gradually went down until it got down to about 12 or 13 cents.

As soon as you get up to the next crop, people stop buying the next.

- Q. What has the 1913 crop to do with the 1912 crop?
- A. As soon as you get up to the next crop, people stop buying the old crop.

The old crop is practically unsalable.

Q. As an expert, if a man had 2000 bales of Cosumnes hops of the 1912 crop on hand in November, and was not able to dispose of them until February or March when they began to sell the 1913 crop, could he sell the 1912 crop at the same price as the 1913 crop?

A. No, sir; not if there was a surplus of the 1912 crop.

Q. What did you do with these 2000 bales of hops that you sold to the Pabst Brewing Company and that they refused to accept?

Mr. POWERS.—I object to the question on the ground that it takes into consideration that there was a sale of 2000 bales of hops, and there is nothing in the testimony that there was a sale of 2000 bales of hops.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

### Exception #7.

We sold them as we got opportunities for selling them through our traveling men in the east. They could not possible be sold in one lot because 2000 bales is an enormous quantity of hops. To sell that out in one lot it would simply [69] be a case of slaughtering.

There are two hundred pounds to a bale. Hops grown in this part of the country run from 180 to 215 pounds. They are baled in a press. The presses are uniform.

Q. How many pounds does a bale of hops contain? Mr. POWERS.—I object to the question on the ground that it is irrelevant, incompetent and immaterial. The contract, the alleged contract, specifies 2000 bales, and we ought to know what those 2000 bales actually weigh.

The COURT.—The objection is overruled. There is a usual and ordinary method of packing a com-

(Testimony of E. Clemens Horst.) modity of that kind.

Mr. POWERS.—We except.

#### Exception #8.

A. About 200 pounds.

Q. The presses are uniform?

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial. This alleged contract specifies 2000 bales. I submit it is irrelevant, incompetent and immaterial.

The COURT.—I will overrule the objection.

Mr. POWERS.—Exception.

### Exception #9.

A. Yes. We sold them just as though they were our own hops. Our salesmen went over the country with the samples. We tried in good faith to sell them at the best advantage. It took a long time to sell [70] them and in selling these hops we incurred traveling expenses, insurance and brokerage.

Q. Was the amount taken from your books?

Mr. POWERS.—The books are the best evidence.

Mr. DEVLIN.—If you want the books, we will bring them here.

Mr. POWERS.—We do.

Mr. POWERS.—We do. The books show the amount we received for the hops, our expenses and so forth. There are about a dozen large books, contain other extracts of a private nature.

Mr. DEVLIN.—The books could be brought into court but it would take a great deal of time.

Mr. POWERS.—I would prefer to examine the books in the ordinary way.

The COURT.—They do not need to be brought here. Counsel may have an opportunity of examining these different items.

WITNESS.—I am personally familiar with the several items outside of the books. I have made extracts from the books in a tabulated form.

Q. Please produce it.

Mr. POWERS.—We object on the ground that it is irrelevant, incompetent and immaterial, a self serving declaration, made by the party himself, and the books themselves are the best evidence.

The COURT.—The books are the best evidence, but he has a right to testify to the result derived from an examination of these books. You may verify them on cross-examination after having had an opportunity to examine the books. [71]

Mr. POWERS.—Exception.

## Exception #10.

- Q. What is your first sale?
- A. There are forty sales here.
- Q. What is the date of the first one?
- A. November 19th. On November 4th, we had on hand 2000 bales of air-dried Cosumnes hops the same as I have testified to.
- Q. State what you did about selling them and the prices you realized.
- A. We sold to W. P. Downey, Montreal, Quebec; the sales prices are deducting freight to destination, and any other items, it was 17 cents. That sale was three bales. The next is to the F. Steil Brewing Company, Baltimore, Maryland, 14½ cents, 50 bales.

A. This is November, 1912. The next is the Park Brewing Company, Providence, Rhode Island, 5 bales, 17½ cents. The next is to Springfield Brewing Company, Massachusetts, 98 bales, 14 cents. The next is to F. W. George & Company, Providence, Rhode Island, 1 bale, 16 cents. Narragansett Brewing Company, Providence, Rhode Island, 100 bales at 16 cents. G. F. Rothaker Brewing Company, Philadelphia, Pennsylvania, 25 bales at 16 cents. These prices are deducting freight or any other charges.

Mr. DEVLIN.—I will ask you that later.

A. The next is Gutsch Brewing Company, Chicago, 3 bales at 17 cents. Pulkrabek, Chicago, 1 bale at 163/4 cents. Hoffer Brewing Company, New York, [72] 25 bales at 15 cents. Medina Brewing Company, Medina, Ohio, 5 bales at 18 cents. Cooke Brewing Company, Chicago, 10 bales at 17 cents. Florida Brewing Company, Tampa, Florida, 10 bales at 171/4 cents. F. W. George & Company, New York, 10 bales at 16 cents. F. Sandkuhler, Baltimore, Maryland, 1 bale at 19 cents. Park Brewing Company, Providence, Rhode Island, 15 bales at 15 cents. F. W. McGowan, New York, 5 bales at 15 cents. Bostson Beer Company, Boston, Massachusetts, 50 bales at 16 cents.

The COURT.—That price is so many cents per pound?

A. Yes. Eastern Brewing Company, Brooklyn, New York, 20 bales at 16 cents. Kuhlman Brewing Company, Ellenville, 10 bales at 16½. Those are all of the November sales. December sales: Bruyn-

donckx, London, 1 bale at 173/4 cents. F. W. George & Company, Milwaukee, Wisconsin, 25 bales at 15 cents. Lauer Brewing Company, Reading, Pennsylvania, 5 bales at 15 cents. Centerville Brewing Company, Cleveland, Ohio, 6 bales at 16½ cents. Consumers Brewing Company, Ohio, 5 bales at 17½ cents. Henderson Brewing Company, 20 bales at 14 cents. Medine Brewing Company, 15 bales at 17p cents. F. W. George & Company, New York, 2 bales at 14½ cents. J. Haffner, Lancaster, 92 bales at 16 cents. S. S. Steiner, New York, 44 bales at 141/2 cents. Jefferson Brewing Company, Jefferson, Missouri, 4 bales at 16 cents. Mobile Brewing Company, Mobile, Alabama, 20 bales at 16 cents. Silverton Brewing Company, Silverton, Colorado, 6 bales at 18 cents. Centerville Brewing Company, Fort Wayne, Indiana, 10 bales at 17 cents. [73] Frostburg Brewing Company, Frostburg, Maryland, 3 bales at 18½ cents. Cleveland-Sandusky Brewing Company, Cleveland, Ohio, 97 bales at 16½ cents. Aurora Brewing Company, Aurora, Illinois, 85 bales at 16 cents. S. S. Steiner, New York, 33 bales at 16 cents. C. H. Atz, Egg Harbor, New Jersey, 6 bales at 16 cents.

The other four hundred and ninety-seven bales were used on sales that we had made previously, that is sales, we had made prior to November.

The COURT.—At what price?

A. The Cream City Brewing Company, Milwaukee, Wisconsin, 75 bales at 16½ cents. Gottfried Brewing Company, Chicago, 116 bales at 17 cents.

Cream City Brewing Company, Milwaukee, 8 bales at 17 cents. J. Hoheldel, Philadelphia, Pennsylvania, 10 bales at 20 cents; the same party 10 bales at 17 cents. Krautz Brewing Company, Findlay, Ohio, 15 bales at 15 cents. Eagle Brewing Company, Utica, New York, 100 bales at 17½ cents. United States Brewing Company, Chicago, 91 bales at 17 cents. All of those—they were sales for Pacific Coast hops, and these hops were delivered on those sales.

Q. What was your last sale of the hops rejected by the Pabst Brewing Company?

A. Practically all of them were cleaned up by the end of February—there were a few left at the end of February, 1913.

The price in February ran from 14 to 16½ cents. We endeavored to sell these hops to obtain the best market price.

I have had an account figured up without including San Francisco office expenses. I have not figured [74] anything for any selling expenses on those 497 bales that were delivered on prior contracts.

Mr. DEVLIN.—Do you know what was the fair market price, or what price could be obtained in the month of February, 1912, for hops, choice, air-dried Cosumnes hops, say at the end of February?

A. You could not sell that quantity, no matter what you took, unless you took some slaughtering figure.

Q. What would you estimate?

A. I would not say to sell that quantity of hops at

(Testimony of E. Clemens Horst.) that time a person could not get over ten cents per pound.

Q. State what, in your opinion, was the reasonable price that you could have realized for the sale of 2000 bales of air-dried, choice Cosumnes hops, if sold in that quantity, in the month of February, 1913, at the nearest market.

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, and being an improper question. The contract, if breached at all, was breached in November, and the sale should have taken place then. The question should be directed to a reasonable time after the alleged breach. Also that it does not detail the proper rule for the estimate for damages.

Mr. DEVLIN.—Please state what was the market price that could be obtained in the month of February, at the nearest market for that class of hops in February, 1913?

Mr. POWERS.—I object on the same ground.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

## Exception #11.

A. Eleven to twelve cents per pound.

Nothing has been paid by the Pabst Brewing Company for their refusal to accept these hops. [75]

I have on hand samples of hops taken in September, 1912. They are not as good now as they were then. Because they have aged. Hops deteriorate in time. They ought to be kept in cold storage, and when they are taken out of cold storage they ought to

be used. You cannot take them out of cold storage and keep them. They usually spoil when taken out of cold storage.

These have not been in cold storage. These are duplicates of the samples we sent to the Pabst Brewing Company as samples of the hops we proposd to furnish them. They have been kept in the safe deposit vault in the Mercantile Trust Company's safe deposit vault, San Francisco, California. Mr. Lang had access to them. The package itself has not been sealed all the time. Mr. Lang is the only one that had access to the safe deposit vault. He sealed them and turned them over to me in the sealed package. That seal I have just broken. I have broken the package without breaking the sale, but the samples are sealed on cards.

They are in the same condition now as they were when they were taken out of the bales, except for the depreciation.

There has been no manipulation of them or handling of them at all.

The samples are numbered from one to twenty and twenty-five or thirty-eight, both inclusive.

One to twenty represent the first lot of samples which were sent to Pabst in September, 1912. [76]

Of hops grown on the Cosumnes. Twenty-five to thirty-eight was the second lot of samples that we sent them in October, 1912. They are not all Cosumnes air-dried hops. Among them are other hops. Because I was advised that they would not use Cosumnes hops. So I sent them some other samples.

Mr. Pabst and Mr. Zaumeyer said they would not use any more Cosumnes hops. Mr. Pabst was present in Mailwaukee and Mr. Zaumeyer was in San Francisco. The conversation took place some time after the contract was made.

The conversation took place in San Francisco in July, 1912, a few months before the hops were harvested. They told me they would use nothing but Yakimas, New York State and Bohemian. [77]

# [Testimony of Charles Zaumeyer, for Defendant.]

CHARLES ZAUMEYER was called for defendant out of order, and sworn and testified as follows:

Direct Examination by Mr. POWERS.

I have been connected with the Pabst Brewing Company for 29 years, as brewer and hop buyer and inspector, and had charge of their affairs in September, October and November, 1912. I received 20 samples from the Horst Company in October, 1912, and opened them for inspection, and they were put in a locker in the hop-house of the Pabst Brewing Company, in Milwaukee, Wisconsin. I myself was in charge of the locker and no one else had the key. I next saw the samples in March, 1913. They were opened for inspection by another party and put back into the same locker. They were not changed in any manner. I had the keys of the locker. I did not see the samples again until last week, when I submitted them to the officers taking the depositions in Milwaukee. They were turned over by me to the officers who took the deposition. They were then in the same

condition as when I first saw them, so far as their physical appearance was concerned. On or about October 10th, 1912, I superintended the sending of 4 samples from the Pabst Brewing Company to the Horst Company. I retained portions of those samples. They are here with the other samples and have been given the same treatment as the 20 samples. Subsequently and on or about November 2d, 1912, we received another lot of samples from Mr. Horst, consisting of 14 samples. I gave them a thorough inspection and then I put them into the locker and they were accorded the same treatment as the other samples. I next saw the last two batches of samples, consisting of 4 and 14 each, in the month of March, 1913. They were then opened for inspection and put back into the locker and were not in that locker until last week when the deposition was taken in this case, and they were then taken by the officers who took the deposition and forwarded to this [78] court. So far as external appearance is concerned, there is no change whatever in the samples unless they are a little bit out of shape from handling. They may not be put up in as tight a package as they were before. The same identical papers are around them. None of these samples have been out of my sight until they were turned over to the officers except when they were in the locker. The contents of the samples have not been changed, with the exception merely, that they were inspected.

The witness then examined the samples and opened sample No. 9, and testified so far as the contents are

concerned it is the very same thing in present appearance as it was when I saw it last. It was then offered for identification and the other 20 samples from 1 to 20 were then declared to be in identically the same external appearance.

WITNESS. (Continuing.) "They came in identically the same packages and no changes were made whatever. They are just the same as when they were received by us.

"The 4 samples that were sent by us to Mr. Horst were submitted to us by Mr. C. C. Sweeny. One-half of the sample was kept by us and one-half sent to Horst. They are in identically the same condition except that one-half of the sample was shipped to plaintiff. So far as the half retained by us is concerned, there is no difference whatever in the present condition from what they were when put in the locker."

The witness referred to Samples 21 to 24 inclusive, and testified that the contents were identical with the samples that were forwarded by them to Horst Company in October, 1912.

Witness then referred to the 14 samples received in October, 1912, to wit, samples 25 to 38 inclusive, and testified that they were identically the same package as received from E. Clemens Horst Company, as to the contents and containers.

"The hops are the identical hops that were in the packages, so [79] far as external appearance is concerned. I locked them up and had the only key."

With reference to sample No. 36, the witness testi-

fied, "This sample is smaller than the others. The contents are the same except that we took off a few berries for inspection. I have also taken off a few berries from the rest of the samples. There was a uniform size through the rest of the samples, with the exception of 36. It was not the same amount as the others. The amount that is contained in the package now is practically the same as when we received it."

Q. Compare Sample 36 and 38 as to size. Is 36 a layer or complete section?

A. 36 is too small; it is split; just a few layers taken off the top of the sample. You cannot submit that to a brewer on any sale. It is not usual in the trade to submit such quantity as a sample.

Cross-examination by Mr. DEVLIN.

"I buy all the hops for the Pabst Brewing Company. I buy and sell for them. Have been engaged in that capacity for 17 years. The hops were placed in cold storage, freezing point, 30°. It is kept at that temperature all the year around. It may vary a degree up or down. These samples were kept in cold storage from the time the Pabst people received the same until last week, about a year and a half. They were taken out of cold storage a week ago yesterday, and were given to the officers taking the deposition. I saw the box in which they were contained, in Milwaukee and again this morning, but I did not see the hops until I came into the courtroom this morning. I had not seen the contents of these packages for a year and a half, until last week. All of them were opened up last week and exposed to a room, the tem-

perature of which was about 70°. I do not know how they got to California. While they were in cold storage they were examined by two different parties, on two [80] different days, but they remained in cold storage while being examined. They were then opened about half an hour each time and were put back in the same packages each time. Nobody except the superintendent of the brewery has a key to the cold storage room. The day the deposition was taken I did not have my keys with me and I had to pry open the locker.

"Hops deteriorate by age in flavor and lupulin, when they are taken out of cold storage and exposed to the air. The color in those samples did not deteriorate any. If hops are taken out of cold storage and exposed directly to the air it would practically ruin them, but these were put into a package and sealed up and then they would not deteriorate. I do not think these hops have deteriorated in so short a time. I find them in about the same condition as they were a week ago, when I inspected them right out of cold storage. It does not at present look as if it made any difference to them. These particular samples are wrapped in tinfoil and cardboard and other paper on the outside, and it would preserve the hops longer than being entirely exposed to the air. The samples are made up in about the same style as they always make samples up. We keep them in cold storage because it preserves them in better shape. If they have not been put in cold storage they would have deteriorated with age and color. The fact that placing

them in cold storage, would cause hops to spoil more rapidly when taken out than if they had not been placed in cold storage."

#### Redirect Examination.

After these packages were opened up before the Notary Public, they were put back in the same package and put into this box and the packages were sealed and mailed. The blue containing wrapper was left in the very same condition as it is there to-day, folded right together again and wrapped up, and after the packages were closed with staples, they would not have contact with the air. When [81] they were taken out of cold storage and taken over to the Notary Public they were put back into cold storage.

#### Recross Examination.

During the noon-hour they were put into large mail bags. They were tied together in their original packages, and remained there until after dinner, when we took them out of the canvas bag again. The samples were then introduced in evidence for identification.

WITNESS (Continuing).—The condition of these packages are the same with the exception that a few berries are taken off of each sample for inspection, as at the time they were received from the Horst Company, except the four samples which we sent and one-half of those four samples are the same as those we sent to Horst, with possibly five or six berries taken off for inspection. The sample does not become any worse because I took off the bad berries and inspected them and looked at the inside. I know they are the same hops by the marks on the outside of the package.

## [Testimony of P. C. Drescher, for Defendant.]

P. C. DRESCHER, called as a witness on behalf of Defendant, out of order, was sworn and testified as follows:

Direct Examination by Mr. POWERS.

I am a merchant and am engaged in the hop business, and have been for about forty years, and also grow hops and am familiar with the character and quality of hops grown in Sacramento County, and particularly in the Cosumnes District. bought and sold them for many years. I am now and for several years last past have been familiar with the market for hops grown in the Cosumnes District. I buy in California, and sell in California and throughout the United States. My purchases are all within California. In the year 1912, I was familiar with portions of the crop of the Cosumnes District hops grown that year. A choice Cosumnes hop, in my opinion, is a hop grown in the Cosumnes district, which is of sound condition in every respect, not slack dried or overdried, of proper [82] cure and good strength, or bright uniform color and cleanly The flavor of the hop has to be of good strength and is represented by the lupulin in the hop. I am familiar with drying of hops, but I have never actually done the drying.

With reference to the price of choice Cosumnes hops during the month of November, 1912, the market price obtaining at that time was  $17\frac{1}{2}\phi$ . That was the price from the dealer to the dealer. I could not answer as to the price of the dealer to the farmer. We

did not happen to sell any hops to brewers at that time. It is difficult to say whether the price to brewers was less or more than to agents. Ordinarily the price to brewers is somewhat higher.

Mr. POWERS.—Q. The agents in turn sell to brewers after they buy, do they not?

The COURT.—You are asking about the price of an article we are not concerned with here at all. You are asking the price of choice Cosumnes hops. Now this contract calls for a specific article and you must confine your examination to that. We are dealing here with choice Cosumnes air-dried hops.

Mr. POWERS.—The intent of the parties as shown all the way through, was that at one time it was airdried, and the next time they did not say air-dried.

The COURT.—Both telegrams, if you will read them say air-dried.

Mr. DEVLIN.—They set out the contract in the answer.

The COURT.—The whole controversy here is over choice air-dried Cosumnes hops. It is my duty to confine the inquiry to the matter that is in controversy here. The jury is not to be distracted by evidence that is not going to effect their judgment.

Mr. POWERS.—Q. With reference to Cosumnes hops, how are hops in the Cosumnes district dried?

A. By hot air. I have been there on the ground many times.

Q. With reference to air-dried Cosumnes hops, what was the market [83] value of air-dried Co-

sumnes hops during the month of November, 1912?

A.  $17\frac{1}{2}$ ¢.

Q. What was the market value of choice air-dried Cosumnes hops druing the season from November, 1912, to March, 1913?

A. The market price was between  $17\frac{1}{2}\phi$  and  $19\phi$ .

Mr. DEVLIN.—For what?

A. For choice Cosumnes hops.

Mr. POWERS.—Q. Choice air-dried Cosumnes hops?

A. The term air-dried is not usually applied to hops. They are all dried by air.

The COURT.—You are arguing and not answering the question. Do you know what the market price was of that class of hops? That is all we are concerned with here. We are dealing with a contract that calls for a specific article.

A. From  $17\frac{1}{2}\phi$  to  $19\phi$ .

Q. Would the market at that time for choice airdried Cosumnes hops, take as high as 2,000 bales?

A. It would take as high as 2,000 bales. If they were offered at 10¢ a pound in November, 1912, they would be taken up at once. If they were offered at 16¢ a pound I believe it would not have taken to exceed a week or ten days. If offered at 16½¢ it may have taken a few days longer. It would depend on how actively anyone had offered them. There was a good demand for that class of hops. The proportion of choice hops in the season of 1912, was smaller than usual, owing to the fact of the crop having been damaged by rain towards the latter end of the picking sea-

son. Rain turns them red and frequently makes them unfit for picking. It deteriorates the value greatly.

If all choice hops of one section are sold out, it makes the choice quality of another section in greater demand. The choice hops other than air-dried Cosumnes hops, were fairly well sold out during November, 1912. There was a good fair demand for choice air-dried [84] Cosumnes hops during the season from November, 1912, to March, 1913. The demand was stronger for choice hops at that time than for the lower grades.

Witness then examined samples 1 to 20, and referred to them as follows:

Sample 18 not clean picked. Sample 17 not a choice hop. Sample 16 in my judgment was not a choice hop, not cleanly picked. Sample 14 was not a choice hop. Sample does not give any indication of having been separated before. Sample 13 I do not consider a choice hop on account of its checkered color, and not being cleanly picked. Sample 11 was not cleanly picked. In some cases the age will give you a good idea as to clean picking. It was evident from the age of that sample that it was not cleanly picked. Sample 12 was not cleanly picked.

Witness testified that samples, 15, 9, 10, 1, 19, 5, 20, 8, 4, 7, 3, 6 and 2 were not cleanly picked. Sample 26 dirty picked. Sample 28 dirty picked. Sample 27 not cleanly picked. Sample 30 is not choice airdried Cosumnes hop, is not cleanly picked. Sample 35 is badly picked. Sample 25 is not cleanly picked.

Sample 38 is not cleanly picked, contains stems which are extraneous and which should not be in a choice hop. Those stems lower the grade of a hop very much. Sample 33 is not cleanly picked. Sample 32 is not cleanly picked. Sample 34 is not cleanly picked.

Mr. POWERS.—I show you sample 36 and ask you to examine it and say whether or not it is a complete sample.

A. This sample I am unable to tell anything about because it is very small and not sufficient to give any idea of the age of it. I would not be able to give you an opinion on that sample, because there is not sufficient of the sample to enable me to do so.

Sample 37 is not choice hops, owing to the leaves and not being cleanly picked. Sample 29 is not choice air-dried, not being cleanly picked.

Q. I show you sample 22 and ask you to examine it and say [85] whether or not in your opinion it is choice hops.

A. This sample is also too loose and broken to give a good opinion of judging. The general appearance of this sample is better, but is not as cleanly picked as it should be. With reference to sample 23, I would not consider it choice, although it is better than any of the other samples. With reference to sample 23. I do not consider sample 24 a choice to sample 23. I do not consider sample 25 equal to somple 23. I do not consider sample 24 a choice hop, but it is better than sample 25, and not as good as sample 23. Sample 25 would not be up to sample

24. Sample 21 I do not regard as a choice hop. It is better than sample 25.

Q. Would the samples 25 to 38, referring to those in front of me here, be considered as a delivery under samples 21 to 24, as a basis?

Mr. DEVLIN.—I object to that as being suggestive and leading and calling for the conclusion of the witness. They must prove they are dried. He is asking him about certain hops that are not proved to be air-dried. The testimony is inadmissible.

Mr. POWERS.—There was introduced in evidence a letter of October 15th. Then we telegraphed an answer to that letter, saying we had forwarded four samples.

The COURT.—Were those samples air-dried hops? Mr. POWERS.—No, sir. Our theory is that there was a modification of the contract. We gave him a broader latitude. We did not require him to furnish us air-dried hops. The contract of October 21st became modified by agreement.

The COURT.—It is for the jury to determine whether it was modified or not.

Mr. POWERS.—The question here is whether or not the samples sent are in accordance with those four samples.

The COURT.—Your theory is that it is admissible should the [86] jury find that the contract was modified.

Mr. POWERS.—Yes.

The COURT.—The Court will instruct the jury what is necessary to make a contract, and the jury will

determine from the evidence whether a contract was made. The Court will also instruct the jury what would amount to a modification of that contract, and the jury will say whether it was modified or not, according to the evidence. The testimony is admissible.

A. In my opinion that would not be a good delivery because of the character and quality of these hops here sold by these samples. Whatever those numbers are they are equal to the quality of those later samples you have shown me.

Q. What is the custom between dealers and brewers in buying hops not yet grown where the agreement between the parties is silent as to time of delivery with reference to the custom of delivery, if any?

A. There is no custom of that kind to my knowledge. Unless stated to the contrary such deliveries are usually made as soon as the product is available. The spot market for 1912 crops would be affected for lower offerings for the 1913 crop to be delivered, affected by the crop condition and many other things.

Cross-examination by Mr. DEVLIN.

There is no such thing as a perfectly clean picked hop, without a single leaf in it. They all contain more or less leaves. In every sample I would expect to find more or less leaves. The amount of leaves that are allowed for a hop to be choice is required by experience in handling hops and determining their quality. There is no absolute standard. The quality is determined arbitrarily by what the eyes show. There is no percentage. Hops are never picked free

from leaves commercially. If they were picked absolutely clean it would add considerably to the expense. The leaves are all the green color. The color is changed in drying. The leaves will [87] to some extent disappear. They will not be so visible. I have bought and sold Cosumnes hops. I do not know that there is any difference between air-dried and kiln-dried hops. All hops are dried by hot air. I made no distinction between air-dried and kilndried hops in answering Mr. Powers' questions. I have seen different appliances for drying hops. Practically all the machines I have seen were kiln driers. I have seen a machine different from the ordinary kiln on the Horst place at Wheatland. I do not know whether all the hops in the Cosumnes district were dried in one way or not. I make no distinction between air-dried and kiln-dried hops. I have studied the drying of hops for many years. The degree of heat varies according to the construction of the kilns, some of it between 120° and 150°. It is advisable not to have the air too hot. I have grown hops and bought and sold them. I sold some to Pabst Company in 1911 and 1912. I have contracts with them and with a number of growers in other cities. I am the agent here of the Pabst Brewing Company in the handling of its beer. My hops are sold to whoever will buy them, dealers and brewers. I imagine I sold a thousand bales between November, 1912, and March, 1913. On November 14th, we sold to Faulk-Wanzer 210 bales at 19¢, delivered in California, f. o. b. Sacramento; December 23, 1912,

to Geo. A. Proctor, 200 bales at 17¢. January 4, 1913, to A. Magnus & Sons, 110 bales at  $17\frac{1}{2}\phi$ , January 4th, 78 bales at 171/2¢. Feb. 7, 1913, 300 bales at  $17\frac{1}{2}\phi$ , and 321 bales at  $18\phi$ . Some of them were Cosumnes hops and some of them coast hops. bales were Cosumnes hops. Between November, 1912, and March, 1913, I sold two orders to two different people. They were grown by Chalmers & Mahon. We intended to make a profit on those hops. I cannot say offhand whether we did or not. I don't think they were sold on a prior contract. There is considerable purchasing of hops in advance, tying them up for two or three or four years. There is a distinction between Oregon hops and Cosumnes hops. You generally can tell the difference. Our dealings [88] have been principally confined to California hops. I do not know as I can answer whether there is a difference between the price of choice Oregon and choice Cosumnes hops. The Russian River hops generally sell for less than the Cosumnes hops. I do not know of any grower making a practice of selling to brewers. I think we have a contract with Chalmers who is paid  $15\phi$  on the contract. Some were bought in 1911 and some in 1912. I never sold 2,000 bales to any one customer. It is a very large order. I think 2,000 bales of choice Cosumnes hops in November, 1912, from the inquiries made at that time would have been sold in a reasonable time, I would say twenty or thirty days, depending on the efforts made to reach the market,—not for 20¢, but for 171/2¢. I would place them in the hands of bro-

kers in the different markets to draw from. Some in Chicago, New York, Boston, Milwaukee and St. Louis. I would employ brokers ordinarily in such a case. I cannot tell about the age of a hop by looking at it, but I can tell whether a hop is cleanly picked. It is more difficult to tell about these samples that are two years old, than if they were fresh, except as to the pick.

## Redirect Examination.

In 1911 the prices were at one time up to a little over 40¢. They then commenced to fall off after the turn of the year 1912. The markets of the world were usually filled to meet requirements and were not desirous of buying ahead. The 1912 crop preserved the prices very much better and labor than the 1911 crop.

### Recross-examination.

Some people will take more leaves than others will. To some extent it is a matter of opinion and taste. [89]

# [Testimony of E. Clemens Horst, for Plaintiff (Recalled—Cross-examination).]

E. CLEMENS HORST, recalled for cross-examination.

Cross-examination by Mr. POWERS.

I think there were a little over 3000 bales on hand on November, 1912.

Q. What steps, if any, did you take to set aside that 2000 bales for the Pabst people at that time?

Mr. DEVLIN.—I object to that as entirely irrelevant, incompetent and immaterial.

The COURT.—What time are you referring to?

Mr. POWERS.—On November 4th, 1912, when we told the Horst Company that we would not take them. I want to know whether he segregated the Pabst Company's hops at that time or not.

The COURT.—You may ask him if he was ready and willing to deliver those hops at that time or not.

Mr. POWERS.—Exception.

## Exception #12.

Q. Did you when the Pabst people notified you they would not take these goods because of their quality, that it was not according to their understanding of the contract, set aside or take any steps to set aside or to use any marks or any indications that any portion of the 2900 bales was set aside for the Pabst people.

Mr. DEVLIN.—I object to that as irrelevant, incompetent and immaterial.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

## Exception #13.

Q. You testified that samples 25 to 38 were Cosumnes hops. I am right in that, am I not? [90]

A. I am not sure they were all Cosumnes hops. They were nearly all Cosumnes hops. Possibly they were all Cosumnes hops, but I am not sure that they were.

Q. Is there any way you have of refreshing your memory so that you could tell us?

A. Well, they were all air-dried. I do not think they were all Cosumnes hops. I could tell which

were Cosumnes hops by looking at the marks on the samples.

Q. Will you do so, please.

Mr. DEVLIN.—I object to that as entirely irrelevant, incompetent and immaterial. The only question is whether Mr. Horst here was able and willing to supply hops of the standard provided by the contract. The fact that he sent other samples is entirely immaterial in this case.

The COURT.—I think so.

Mr. POWERS.—My question is, were the 25 to 38 samples all Cosumnes hops, all air-dried Cosumnes hops, or were there other kinds of hops?

The COURT.—You received those samples?

Mr. POWERS.—Yes.

The COURT.—And you rejected them?

Mr. POWERS.—Yes.

The COURT.—The whole question is whether he was able to deliver 2000 bales of choice Cosumnes hops. That is all that is referred to here. If you had taken a different course, and had rejected them because they were not Cosumnes hops, that would be a different thing. The objection is sustained.

Mr. POWERS.—Exception.

## Exception #14. [91]

Q. Did you have any other hops on hand save and except these 2900 bales of your own Cosumnes raised hops, with which to fill the contract that had been accepted?

Mr. DEVLIN.—I object to that because it appears that he had a sufficient quantity on hand.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

# Exception #15.

Mr. POWERS.—(Q.) You have testified on direct examination to the places where you sold 2000 bales of those Cosumnes hops. Where did you sell the other 900 bales that you had on hand at that time?

A. We used them on deliveries for choice Pacific Coast hops, on contracts that were made prior to November 4th. We got as high at 26¢ for some of them. Delivered in the east that would be about 22 cents, out here, about 24 cents out here. They were substantially of the same quality of hops. The contract called for a higher quality.

Mr. POWERS.—(Q.) With reference to the market for choise hops in November, 1912, and December, 1912, was the market for choice hops at that time a falling market or a stiff market.

A. The market was falling.

Q. Was it the same character of market for choice and for medium hops, at that time.

A. Whenever the market falls, it falls on everything, and when it goes up, it goes up on everything.

Mr. POWERS.—(Q.) If Sacramento hops are selling at 17½ cents and 18 cents and 19 cents, choice, in November, 1912, and December, 1912, to February, 1913, and certain other hops in the market also raised in Sacramento which could not [92] be distinguished from Cosumnes hops raised in Sacramento County from the external appearance,

are selling at 14, 15, 16 and 17 cents, would not that indicate that the last described hops were not choice hops. A. No, sir.

The difference between air drying and kiln drying—air-dried hops while superior in brewing qualities are generally inferior in appearance, generally speaking, because the leaves in air-dried hops do not dry up; they do not disappear in the drying process; consequently, from the general appearance, they would not be as salable. If a man judged only by appearance they would not be salable.

If you take California hops, you have got to start in with the hop-drying floor. That is the only place that you can tell the difference between air-dried and kiln-dried hops, if they are of equal picking.

Buvers see samples in their counting-houses.

Q. In that place it would be impossible to pick out which was kiln died and which was air dried?

A. It depends upon the amounts of leaves in each. You have got to start in with the same class of hops, and then after you run them through the drying process, if you start in with the same class of hops, and then you dry them at different temperatures, or you use different methods of handling, then you see in the resultant sample a different rate of cleanliness.

Q. If you are shown two samples of hops in a counting-house in Chicago, or New York, you would be unable to say which was a kiln dried or which was an air-dried hop, according to your process?

A. No, I could not be sure of it. [93]

Mr. POWERS.—(Q.) With reference to the sale of hops to W. P. Downey, Montreal, Quebec, three bales at 17 cents, who made that sale?

- A. That was made from New York.
- Q. How do you know it?
- A. From our books.
- Q. It was reported to you by somebody else?
- A. Yes, sir.
- Q. How was it made?
- A. I could not give you the details of that. I could not tell you.
- Q. With reference to price, was that F. O. B. in cars on the coast or delivered at Montreal?
- A. I can give you the full statement of my figures on that. I have not got that in my head. I have the vouchers right here.

The COURT.—Have you got the voucher for this sale he is asking about, or evidence of the transaction?

A. These are all the vouchers for that period from November to June, the selling period, for the New York office and the Chicago office. There is no possibility of applying any one voucher to any one sale.

Mr. POWERS.—(Q.) Then you do not know what money was spent in regard to the sale of goods in Montreal of your own knowledge?

A. No, I do not. I cannot connect the particular expenses with a particular sale.

Yes, sir.

I, myself had nothing to do with any of those sales, except running the business, that is all. I do

not carry in mind if the sale is made in Montreal. I am not in Montreal at the sale personally. [94]

Mr. POWERS.—(Q.) With reference to this sale in Montreal, at 17 cents, had there been any other transaction between Mr. Downey and yourself that year?

A. I have got the statement of all the business between those statements. I have got the statement with me of every sale that was made of Cosumnes hops, as well as all other hops, from the 5th of November to the end of June.

I cannot tell you whether I made any other sale to him or not unless I look at that statement, then I would only know as to that period.

Q. Was this price made to Mr. Downey a special price in order to make up for some other transaction you had with him?

A. No. Every sale we make is independent. It stands on its own feet. There was no selling one lot for another. Nothing of that sort.

Q. How do you know with reference to this Downey sale, whether or not that was the fact?

A. I know we would not sell two lots of hops, and have one hop sell another. We would not do that.

Q. How do you know that was not done in this particular transaction?

A. I know we have not done it. I do not know of any other way to tell you.

I was not present.

Q. You do not know of the sale except that it was reported to you?

A. That is all.

With reference to the goods shipped to Gottfried Brewing Company in Chicago, I cannot tell you whether [95] any of them were rejected or not. The Gottfried Brewing Company rejects hops every year.

I do not know that we delivered any Cosumnes hops to them. Gottfried has rejected hops every year since I have done business with him.

We had a contract with the United States Brewing Company of Chicago to deliver them Pacific Coast hops at 17 cents. They accepted some Cosumnes hops under that contract and rejected some. Those rejections and complaints were all prior to November 5th.

- Q. They were all the same character of hops as those that you subsequently tendered to Pabst?
  - A. They were all choice hops.
  - Q. What became of those rejections?
- A. Those people kept them. They simply made me make an allowance. They held me up. Whenever made an allowance they are not charged up. These allowances that we made were all made prior to November 5th, and they had nothing to do with the 3000 bales.

They were substantially the same class of goods, and where one man could not take them at 12, another man would take them at 15 cents. I have a contract with the Atlas Brewing Company for the last ten or fifteen years at various prices. I cannot tell you what contracts we had on hand at that date.

A. With the exception of 150 bales, all the rest of the bales are of equal grade. They were all choice grade, every bale. One bale was substantially as good as the other. They were not of the same kind. They varied.

Q. Well, they were all of the same kind, were they? [96]

A. No, not of the same kind. They varied. We did not pick them all the same day. You are picking hops about three weeks, and the hops you are picking the first day are not identical with the hops you are picking the second day.

- Q. They are choice? A. They were choice, yes.
- Q. They were all of the same degree of choiceness?

A. Yes. But they were all of the same degree of choiceness. There was no rain during the time we were picking hops. We were one of the few people that got through before the rain. It took about three or four weeks to pick about 4500 bales. We used a machine. We started in picking the ripest first, then went along and by the time we got them picked, the hops were no riper at the end than the hops we started to pick at the beginning. The hops you pick in the early part of the season sometimes are green, but not always. It sometimes happens that the hops you pick on the first day are the ripest, and the greenest hops you pick on the last day. conditions being the same on our land as the conditions on other people's land, our hops ripen substantially as other people's ripen.

There was the same possibility of other people's hops ripening rapidly as ours.

- Q. Did you ever know of a crop of hops picked on anybody else's land of over 4500 bales where the crop was uniform in quality throughout, before?
  - A. Why, yes.
  - Q. Where?
- A. There is no reason why they should not be uniform.
  - Q. The entire crop?
  - A. If the hops are picked uniformly.
  - Q. You think they would be of uniform quality?
  - A. What do you mean by uniform quality?
  - Q. Uniform in quality?
  - A. Equal quality, or identical.
  - Q. You say uniform in quality?
- A. Yes, a crop may be uniform in quality. Simply the skill in picking and drying them makes uniformity in quality.
- Q. You had the only machine-picked hops in the market? A. Yes. [97]

We had the only air-dried hops on the market, that is hops that were dried by outside blast, except the plant belonging to Pabst Brewing Company in Wisconsin. There was no other operated in Sacramento County. The only difference between our process of drying and the kiln process of drying is in the kiln dried you dry your hops at a warmer temperature than you do with our dryer. They are all dried in the house. They are all dried by applications of hot air in the house and our process it is

hot air generated and passed in and in the other case, it is hot air created by stoves or furnaces on the inside. Choice hops are the best hops in the district that you refer to.

- Q. What are the qualities of a choice Cosumnes hop?
- A. Soundness, properly cured, cleanly picked, good color, freedom from disease, freedom from mould, freedom from any form of damage. Lupulin also plays a part. It is grown in the hop, and whether or not it is, is determined by looking at it. Our contract provides for 2000 bales of Cosumnes air-dried hops. We were the only persons who grew air-dried hops.
- Q. Then according to your interpretation of that contract, the best of that crop during the year 1912, would have to be accepted by Pabst in compliance with your contract, whether they were choice hops or not?
- A. If the hops were sound, if the hops had no faults. I would not intend if the hops were dirty, or the hops were damaged, or poorly dried or picked, or bad in any other way, that they would be choice hops.
- Q. They had to be the general quality of choice Cosumnes hops?
  - A. Choice air-dried Cosumnes hops.
- Q. Air drying and kiln drying both produce a hop, but they are simply different methods of preparing them for market? [98]
  - A. When you get right down to it one hop is as

good as another hop for brewing. You simply put them on a market, and you give a man what he wants. Air drying refers to the process by which the hop is cured.

- Q. It does not refer then, to the finished product?
- A. Air-dried Cosumnes hop. You confine yourself to that particular locality.
- Q. You could take an air drying plant and establish it anywhere you wanted to?
  - A. Yes, you could in time.
- Q. When you speak about air drying it provides for the manner in which the crop is cured?
  - A. It refers to the manner of curing the crop.

The COURT.—In other words, air drying does not refer to the particular character of the hop that is grown?

- A. No, sir.
- Q. It simply refers to the mode or method or manner of curing it? A. That is all.

My estimate of the difference in value of air-dried as distinguished from kiln-dried, was the result of the qualities being better preserved by the air drying than by the kiln drying. It is better. It is hard to get anybody else to see it. That is the trouble. I cannot tell the difference between air-dried Cosumnes and kiln-dried Cosumnes hops after they are dried. To look at them you could not see the difference.

We do not get a higher price for air dried than we do for kill dried. In fact we are at a disadvantage in selling air dried, because we cannot sell them

to the dealers. They won't sell them for us. We have to go to the brewers, and we are set out of a considerable on that acount. As soon as a hop is known to be air dried, why, we cannot get the dealers to buy them. They will not handle our product, because they market their own hops themselves.

[99] They market their hops direct to the brewers themselves. Each hop dealer has a trade, and we have to sell our hops to the brewers, because the dealers will not buy our goods. We sell our hops to the brewers,—the dealers naturally won't buy ours because they are advertising our business. They feel that they are making business for us; therefore, it is harder for us to sell air-dried hops than it is kiln-dried hops.

- Q. You say as an expert that when a crop for future delivery of hops, not then grown, is entered into, that is the universal custom to consider that it is at the dealer's option in regard to when they are to be delivered, is that right?

  A. Yes.
  - Q. Is there any variation from that?
- A. Never. That is, within a reasonable time. I do not say it is at the seller's option to deliver them at any time he pleases. I said within a reasonable time. I say within the shipping season. From the time of picking until the end of February.
- Q. Why did you send to the Pabst people a form of contract, after this telegram, for deliveries from September to December?
- A. Because on the 1911, that I made at the same time, Pabst was asking us to make the shipment of

the 1911 crop from August until the end of December. They specified that time in the 1911 and because they had done that, I specified the same time in the 1912 crop sale.

Q. Did you furnish them samples in 1911 before shipment?

A. I presume I did. I do not know whether I did ot not. It was not customary to send samples before shipment of the goods. I never sold the Pabst people any hops before those two lots.

Q. Did not you sell Pabst some hops in 1906?

A. I think I did. I think I sold them a hundred and fifty bales in 1906.

Q. Did you send them samples at that time?

A. I cannot remember, [100] 1906. I sold Pabst three lots of hops. One lot of 150 bales, a good many years ago. I do not know what year it was. Then 500 bales in 1911 and 2000 in 1912.

After I sent the wire to the Pabst people reading, "If you wire you will accept the hops quality samples you send, we will arrange accumulate such hops for you," I received the four samples marked 21–22–23 and 24. Two came in one mail and two came the next day. I subsequently shipped them samples of hops thus marked 25 to 38, that I considered to be in conformity with these four samples of hops. All these 14 samples of the second lot shipped were the same size. Substantially the same size, as these samples here. One sample might cover the sale of 1000 bales or 5000 bales. No matter what the quantity of the hops were they could all be represented by one sam-

ple by showing their quality, if you were to send samples at all. If you have one sample you can inspect a thousand bales with it. The sample is to represent the character and quality of the goods that you tender for sale. The buyer does not have to wear out the sample comparing it. It is not the custom of the trade to deliver one sample for not exceeding one hundred bales. I never shipped any of our Cosumnes hops choice by fruit express. I do not know of any freight more rapid than any other freight in the line of shipping here.

The brewers did not lay in stocks of hops in 1911 on account of short crop. They had tough sledding to get along until the 1912 season. During the 1912 season they had a crop and a half, too many of them in 1912.

Q. And as a consequence brewers wanted choice hops?

A. They wanted any kind of hops. They wanted hops.

As far as the four samples which I received from the Pabst people, they are in the same condition now as when received by us. [101] No portions of them have been taken off. Mr. Lang who is in our employ has possession of them in the safe deposit vault. Witness is shown a draft of the contract signed E. C. Horst Company by E. C. Horst.

Q. Will you explain how you happened to send that draft of contract to the Pabst people referring to this thousand bales, deliveries September to December, if that was the universal custom to make deliveries of

(Testimony of E. Clemens Horst.) the crop to the following March?

A. I made an exception in this case because of that concurrent sale of 1911; wherein Pabst indicated deliveries by the end of December, so I made this contract the same way. I thought that I had a longer time to deliver, but I was satisfied to limit my time to December. I thought the Pabst people might prefer it. They informed us of their wishes in another telegaram and I wished to conform to their wishes.

Q. Subsequently did the Pabst Brewing Company send you another order of which this is a copy with the exception of the lead pencil writing?

A. Yes.

Mr. POWERS.—We offer it in evidence.

The Pabst people did not accept and forward any hop contract in accordance with the printed form, which we had forwarded them.

The said draft of contract was and is in the words and figures following:

PURCHASE ORDER. No. 54808
PABST BREWING CO., Req. " C. Z.
Dept.

Milwaukee, Wis., Sept. 8, 1911.

E. Clemens Horst Co.,

San Francisco, Cal.

Please forward the following to Chestnut St. Depot Via C. M. & St. P. These goods must reach us. Shipments to be made during October, November, December, January and February. [102]

2000 bales choice air-dried Cosumne California Hops, Crop 1912, at  $20\phi$  per pound f. o. b. Coast.

We insist on submission of samples and approval

(Testimony of E. Clemens Horst.) thereof before shipments are made.

Mail bill at once, putting PURCHASE ORDER NUMBER thereon. Also mail BILL OF LADING with weight and through freight rate. All goods are received subject to our count or weight and inspection. Terms: Cash, less 2% 10 days after goods are delivered or on or before 10th of month following purchase; otherwise settlements are made on the 22nd of each month following purchase of goods. All freight charges must be prepaid.

If you cannot ship so that goods will reach us on the day specified above, notify us at once, giving date on which you can ship.

# PABST BREWING CO. H. J. STARK,

Secretary.

In one of our letters with reference to 1500 bales of hops to customer in the Middle West. This was the Schlitz Brewing Company. We did not sell the Schlitz Brewing Company Sacramento hops. We sold Schlitz higher grade hops. We delivered those hops, 1200 bales, and they were on a higher contract, a contract for a higher grade than Sacramento.

Q. Then this statement that you delivered in accordance with samples 25 to 38 is not correct?

A. Yes, it is correct.

The COURT.—That is sufficient on that subject. That is purely collateral.

I do not think we sold Cosumnes hops to anybody else but Pabst. We sold Pacific Coast and then delivered Cosumnes on that contract.

They were the only hops we sold as Cosumnes. We sold the others Pacific Coast hops.

I can give you a list of the people to whom we delivered the last 2000 bales. I have not got that in my head. I had 2900 bales at the time the Pabst people defaulted. [103]

I could not tell you how many hundred bales there were in November on hand of Cosumnes grown by other growers.

There were about 9000 bales grown in the Cosumnes District.

There might have been 500 bales or 200 bales or a thousand bales. I would not think as many as 1000 bales.

I never heard of any sales of choice Cosumnes at  $18\frac{3}{4}$  per pound f. o. b. coast, or of  $19\phi$  a pound.

- Q. If you had choice Cosumnes hops on hand you could have gotten just as good a figure as anybody else with choice Cosumnes, could you not?
- A. I cannot sell them as well as other people. These people that sell the hops, they generally deal in business with friends, and they travel on their own account in the east and have their own limited number of friends, and they get a fancy price, and we do not because we have to sell through employees. And even if we sold at a less figure we could not sell our hops. In my opinion samples 25 to 38 are choice. There is a difference in them but they are all choice, and are as choice in quality as samples 21 to 24, and are substantially the same grade of hops.
  - Q. When is a choice hops to be rejected because of

(Testimony of E. Clemens Horst.) the manner of picking so far as it being dirty or clean?

A. When there is an excess of extraneous matter, then it ceases to be choice. That is to be determined by any familiar with the hop growing. People who are competent to distinguish must use their own judgment as to whether or not the amount of extraneous matter present is sufficient to prevent it from being a choice hop. The grading of hops is like the grading of other commodities, such as wheat, and things of that kind, and with hops, the picking, packing and curing has a great deal to do with them. Pabst people sent me the samples and then I matched them and tendered them the hops and they could not tell the hops thus tendered from [104] any other samples they had sent me. Machine-picked hops do not bring a larger price than hand-picked hops. The clean hand-picked hop is as clean as the machinepicked hop. The Horst crops could be sold by us if we would hire salesmen and pay them a high enough salary. The salesmen stand up for fancy salaries and we better sell hops cheaper and do away with a fancy salesman.

Q. If other dealers could sell hops for 19¢ in February, 1912, choice Cosumnes, was there any reason why you could not sell choice Cosumnes?

A. I do not know what the particular wants of the particular buyer may have been, or what sort of a sale of hops it might have been. A man might buy hops at 30¢ and another man might buy hops for 19¢ when the hops may have been 13¢.

Q. Where there are two lots of hops, equal in quality one Horst-grown and one grown by somebody else, if the price of the Horst-grown hop was  $\frac{1}{2}\phi$  less than the other, would not the Horst-grown hop get the benefit of that sale?

A. No, not if there was 2¢ difference. Hops are an article that are not sent to market like anything else. A man will travel around sometimes for a week, or two or three or four weeks and not sell a bale of hops. He will have to make friends to sell them. It is not an article that is marketed like an ordinary article such as hav and barley, or wheat, or anything of that sort. There were buyers in the Sacramento market for choice Cosumnes hops from November, 1911, to March, 1912, if you could find them. The dealers would not buy from us. We did not send any hops east earlier than usual that season. You could not sell 2000 bales of Sacramento hops or Cosumnes hops, or any other kind of California hops during that time except at a forced sale. It does not make any difference what the price was, we have to find a customer. Even if it was lower than the price of others you could not sell hops in that amount. They would not buy them. F. W. George & Company, S. S. Steiner, [105] Smith & Capron, L. G. Jacks, Bauer Schweitzer Company, are all dealers.

Q. Then you were mistaken the other day when you said dealers would not buy your hops?

A. Unless they get them dirt cheap they will not buy them from me the same as they will from some other people.

- Q. The Henderson Brewing Company is not a dealer? A. No, sir.
- Q. Why did you sell to the Henderson Brewing Company for 14 cents when you sold to Mr. George for 16 cents, and to Mr. Steiner for 14½ cents?
- A. We took whatever we could get as fast as we could get it.
- Q. It did not require salesmen to go around the country in order to take whatever you could get, any price you could get?
  - A. It was hard to unload it.
- Q. Was it necessary to maintain an office in New York and a man with a salary of five hundred dollars a month in order to dispose of these goods in the manner you have testified?
- A. We did not hire that man for that purpose. We had a man there. He sold those hops and the expenses were apportioned.
- Q. As a matter of fact, was not that manager of your New York office up in Montreal and spent a great portion of his time trying to sell goods up there in November, 1912?
- A. They were travelling around all the time. We took the expenses they incurred in travelling around all the time and apportioned them. All of the time they were trying to sell these hops.

Mr. POWERS.—I move that the answer be stricken out as not responsive to the question.

The COURT.—The answer is quite responsive to the question.

Mr. POWERS.—Exception.

# **Exception** #16. [106]

There was no hope of selling Pabst goods at a profit in Canada because of a tariff. When our men went into Canada they did not go there with the idea of attempting to sell Pabst goods. We shipped one bale to London early in December as we wanted to sell the hops on the European continent. The continental buyers buy in London. We sent a sample bale over there to the market. We maitain an office in London and sell a large quantity of hops there, but we did not charge up any London expenses. We sell some hops in England through the London office, but the bulk of them are sold on the continent through the London office. The reasonable allowance to a broker for making a sale of hops in November and December, 1912, was 1½ a pound. We pay from 1 cent to 11/2 cents. On a cent a pound, we pay the expenses. On a cent and a half a pound, we expect the man to pay the expenses. I do not recollect who it was I hired at 11/2 cents. Brokers that sell between dealers and dealers get one-half a cent, and some of them get only one-quarter of a cent. These brokers that do business between the farmer and dealer, they get one-half a cent. Some of them get three-quarters of a cent. Brokers contract for the same price in selling for the dealers as they do for the grower, but we cannot get the broker to sell our hops to other dealers. One and a half cents a pound was a reasonable allowance to make to a broker for the sale of hops in 1912 in

selling them to brewers. E. C. Horst Company sold 300 bales of hops of equal or better quality than the early California choice hops of 1912.

Q. Did you use Cosumnes hops to fill that contract, or any part of it?

A. I do not know as I can give you the data for that. We did not pick this crop of Cosumnes hops extra early in order to fill that order. We started to pick on the 12th day of August, and we stopped picking on the 7th day of September. We picked only a few [107] hops the last few days of the season. I have got the detail of each day's picking.

We do not weigh hops at all. We simply guess at what the weights are. This is green weight. It takes about three and a half pounds of green hops to make one pound of dried hops. All of those estimates there are in green weight. We picked between twenty-one and twenty-two thousand pounds on August 12th. That is 200 pounds of the 21,000 pounds. We picked off a few hops from the vines after they had gone through the machine.

On August 13th, we picked 49,000 pounds and 1075 pounds were picked by hand. The next day we picked 104,000 pounds. 2400 pounds of those were hand-picked:

Date.	No. of pounds picked by machine.	No. of pounds picked by hand.
August 12th:	21,626	244
August 13th:	48,099	1175
August 14th:	98,573	2515
August 15th:	77,094	2185
August 16th:	102,647	1771
August 17th:	103,215	2343

	<i>V</i>		,	
$egin{array}{c}  ext{Date} \  ext{August} \end{array}$			No. of pounds picked by machine. 98,898	No. of pounds picked by hand. 1756
August			97,838	2326
August			103,236	2339
August	21st:		96,932	3292
August	22nd:		87,033	9945
August	23rd:		73,521	5940
August	24th:		$114,\!262$	4479
August	25th:	•	102,305	4505
August	26th:		106,757	4652
August	27th:		94,787	5189
August	28th:		$126,\!577$	5510
August	29th:		129,772	5626
August	30th:		137,529	3831
August	31st:		129,376	5104
Sept.	1st:		123,435	4850
Sept.	2nd:		113,276	6422
Sept.	3rd:		95,625	3057
Sept.	4th:		60,013	
Sept.	5th:		49,410	
Sept.	6th:		22,581	
Sept.	7th:		24,300	
FT71		1.7		3.6 3 14

There was another contract with the Manhattan Brewing Company, where we agreed to sell 100 bales of hops equal to or better than early choice California hops of 1912 at 27 cents a pound. [108]

We made an allowance to the Schlitz Brewing Company for two carloads out of the 1200 bales.

Q. And you made the allowance because of the quality? A. No, because of policy.

The New York office took care of the rejections of other goods than Cosumnes hops and of all other

business. Everything that was pertaining to our business they took care of there.

I did not know personally what was done by each man when he went out on a trip other than by the knowledge I gained from what he told me.

### Redirect Examination.

Please state whether an expert could form a fair and accurate opinion as to the quality of hops of 1912 by the samples now in the courtroom, in their present condition.

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, calling for the conclusion of the witness, and argumentative.

The COURT.—Objection overruled.

A. No, sir. Because the samples have aged and they are mussed up. The hops deteriorate with age and mussing hurts their general appearance and you see the leaves more in a sample that is mussed up than you would otherwise.

Q. Would you as an expert undertake to say what the quality of the hops was in 1912 by an inspection of these two samples after two years?

Mr. Powers.—That is objected to as irrelevant, incompetent and immaterial, and in no way intending to impeach the opinion of our expert. It is irrelevant, incompetent and immaterial, calling for the conclusion of a witness on matter that is now the subject of expert testimony. [109]

The COURT.—Objection overruled. Exception.

# Exception #17.

A. Well, you can see that the hops are now no

(Testimony of E. Clemens Horst.) worse than the samples indicate.

Mr. DEVLIN.—(Q.) Would the samples have to be kept, preserved in order to give the Court and the jury a fair indication of what the hops were two years ago that these samples were supposed to represent?

Mr. POWERS.—Same objection.

The COURT.—I will overrule the objection.

A. Samples should be kept tightly wrapped and properly handled and not mussed up. It makes them look poorer. Some of them have been split, that helps muss up the sample. In taking samples you try to show the character of the hops. Hops are not uniform all through the bale as to leaves. There is a variety of hops called fancy, which is better than the choice hops, but there is no such thing as a perfect hop. Samples one to twenty are the same class of hops as 21 to 24. They are mussed up. Samples 25 to 38 are so mussed up that they would not enable an expert to judge with any degree of accuracy what the original condition of the hops was, because the samples are aged and have not been properly kept. We retained duplicate of the samples we sent to the Pabst Brewing Company. They are numbered the same. Hops taken out of cold storage would immediately deteriorate.

Q. If you were undertaking to pass upon the quality of hops of 1912, would you as an expert consider it fair to take samples of hops that have been kept in cold storage for eighteen months or so, taken out of cold storage and transmitted on a journey of three

thousand miles in a railroad car and that have been handled from time to time, broken up and mussed up.

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, calling for the conclusion of the witness upon a matter [110] which is not the subject of expert testimony, and argumentative.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

## Exception #18.

A. Samples kept under those conditions cannot be properly judged or fairly judged. The soundness of hops is produced by drying and curing. The factors which go to make up the value of a hop are the district in which it is grown, the time of picking, the proper picking as to the season, and the fatness and fullness of the hop. Its freedom from spider damage, its freedom from louse, and freedom from discoloration. Freedom from curing defects or baling defects. Proper picking. Curing includes drying. It is impossible to get any hops that do not contain more or less leaves.

Hops have volatile oils and these volatile oils will disappear with age.

The word choice hop is an elastic term.

Where one grade runs into another is a doubtful point. There is a range between grades of hops. Pacific Coast hops are generally considered of better quality than Cosumnes hops. It means the first average quality of the Pacific Coast, and a better quality of hops than if I sold to you choice Cosumnes

hops. Because they have a wider range to pick from.

Mr. DEVLIN.—Q. The Pacific Coast quality raises the quality of the hop, whereas the Cosumnes' hop may lower the quality of the hop. The point here is whether Cosumnes hops as a grade of hops, are lower or higher than the average Pacific Coast grade.

A. Cosumnes hops are the same grade—some Sacramento hops are low-grade hops, lower grade hops than Pacific Coast hops. Soil and climatic conditions.

Russian River hops are considered very high, in the hop grade. The highest grades are Yakimas, Russian River, then Oregon and Sonomas, then Western Washington, then Yuba County [111] and Yolo County, are higher than Sacramento.

[Testimony of Paul E. Peterson, for Plaintiff.] PAUL E. PETERSON testified as follows:

Direct Examination By Mr. DEVLIN.

I reside on the Cosumnes River. I am a hop grower. Have been in the business for twenty-five years. Have been engaged in Sacramenta and Yolo Counties. My land is in the Cosumnes District near the land of the plaintiff. Am familiar with the supervision and care-taking of hops. First grew them in 1912. Did not see the 1911 crop. I have sold hops. Generally sell my hops as choice hops. I consider a choice hop to be one that is fully matured, fully cured, properly handled and not over

(Testimony of Paul E. Peterson.)

ripe. There are some hops known as fancy hops.

Q. Say out of 2,000 bales, would choice hops be the best bale out of 2,000 or the average bale?

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, and calling for the conclusion of the witness, on a matter that is not the subject of expert testimony.

The COURT.—The objection goes to its weight and not to its admissibility. It is for the jury to determine the value of his knowledge, but it is entitled to go to them.

Mr. POWERS.—Exception.

# Exception #19.

A. It would be the average bale. I remember about a year ago last October that certain samples of hops were submitted to me from the Cosumnes district. I examined certain samples in the courtroom. I can tell whether they are well picked according to the age of the hops.

Q. Explain to the Court and the jury how age affects the question.

Mr. POWERS.—That is objected to as irrelevant, incompetent and immaterial, calling for the conclusion of the witness on a matter [112] that does not affect the issues of this case.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

# Exception #20.

A. It affects the flavor and looks of them. You cannot tell whether they are cured properly or the quality of the hops. You can tell whether they are

(Testimony of Paul E. Peterson.) well picked, that is all. You can tell as to their picking by the appearance.

Q. I show you twenty samples of hops introduced in evidence, being numbered one to twenty, sent by E. Clemens Horst Company to the Pabst Brewing Company. You saw them at noon to-day. Look at them again if you desire to, and state to the jury whether you consider them in your opinion as choice hops?

Mr. POWERS.—I object to that as calling for the conclusion of the witness on a matter he is not shown to be an expert in.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

# Exception #21.

- A. I consider them prime to choice.
- Q. Would you consider them as good as your hops of the same year?

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, and calling for the conclusion of the witness.

The COURT.—You may ask him if he regards them as hops of the grade he has stated, prime to choice of that season.

- Q. Do you regard them as choice hops of the season of 1912.
- Λ. Yes. All hops in picking contain more or less leaves.
- Q. Is it practical commercially to pick hops so that there will not be any leaves in the hops?

Mr. POWERS.—I object to that as irrelevant, in-

(Testimony of Paul E. Peterson.) competent and immaterial, and calling for the conclusion of the witness on a matter he is not to be

clusion of the witness on a matter he is not to proven expert in. [113]

The COURT.—Objection overruled. Exception.

# Exception #22.

It is practically impossible to pick hops without leaves or stems. I do not think there is undue proportion of leaves in these samples. I cannot tell as to their color or flavor now because the hops are too old. I recognize my initials on the back of sample #11. as the sample I examined in October last.

Q. Were they of good flavor and good color?

Mr. POWERS.—I object to that on the ground that the witness has not been shown to be an expert of such a character as to recognize those qualities in hops.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

#### Exception #23.

Q. What did you find the character of the hop to be as being a choice hop, its flavor, quality of picking, cure and so forth?

Mr. POWERS.—Same objection.

Same ruling.

Mr. POWERS.

#### Exception #24.

A. Choice Cosumnes hops. The flavor was fine. The picking was good. (The witness testified the same as to samples 17 to 18.)

Q. What did you find it to be?

(Testimony of Paul E. Peterson.)

Mr. POWERS.—This is all subject to my objection.

Mr. DEVLIN.—Yes.

I show you samples 25 to 38; state whether they are choice hops.

A. They are choice Cosumnes hops.

Q. Do they bear an undue proportion of leaves or a fair proportion?

A. Yes, an average proportion. [114]

Mr. POWERS.—This is all subject to my same objection and exception.

Mr. DEVLIN.—One objection and exception is as good as twenty.

The COURT.—It is all on the ground that he is not shown to be an expert.

Cross-examination by Mr. POWERS.

I do not pretend to be a hop expert. My knowledge of hops has been gained by raising and selling them for about 25 years, and about three years in the Cosumnes district. I have never bought hops for market. My experience has been gained by growing hops and getting them ready for the market. If a hop was otherwise good and was dirty picked, it would be rejected as not a choice hop.

Q. Leaves and stems or any other deleterious matter is called dirty picking? A. Yes.

Witness is shown samples 38. State whether or not you consider that a clean pick?

A. There is a stem in there that should not be there, but that may have been an accident. I would (Testimony of Paul E. Peterson.) prefer to see another sample of two.

The COURT.—Take that sample as a whole. Would you say it was cleaned picked or not?

- A. I think it is. I have figured that all hops with as much as six or seven per cent of leaves and stems are clean picked.
- Q. If it has got at least six or seven per cent leaves or stems you still consider it a choice hop?
- A. Yes, I would consider it a good average choice hop. I sold my hops that year for 22 cents. There were some hops of that character sold that year in November, but I do not remember. I am not a hop buyer, so could not tell. There may have been some sold.

That is all. [115]

# [Testimony of E. Clemens Horst, for Plaintiff (Recalled).]

E. CLEMENS HORST on further redirect examination.

When it comes to selling hops it is very hard to find buyers at any time of the year because there are so many people in the business. I had a conversation with Mr. Pabst in regard to selling our contract in Milwaukee, in December, 1911. He wanted to know that the market was for Cosumnes hops. I told him 27c. He said: "I will sell you back 2,000 bales at 27 cents." I told him we were selling for 27¢ and buying for 25¢ and he said he did not want to sell for 25¢. He told me he was not going to use Cosumnes hops. He said they were going to confine their hop purchases to Bohemian and Yakimas and New York

State and that he wanted me to tell him at what price we would buy back the 2,000 bale contract. He said they might use 500 bales, but he wanted to sell at least 1,500. At that time he asked either 23 or 24¢. I told him that that price was beyond the market and we could not trade. The market at that time was 20 or 21 cents, and still dropping.

Q. Now, you were asked some questions this morning about rejection of hops. I was going to ask you some questions, but have reserved them for redirect examination as to what your experience has been with brewers rejecting hops, and about the policy of your business and so on.

Mr. POWERS.—I object to that as immaterial and not redirect examination.

The COURT.—I think that is a very general question. It is something that he has gone over once or twice. He has said at least twice that rejection occurred with almost every brewer that he had done business with.

The COURT.—Take the Schlitz transaction. That was a transaction calling for 1,500 bales. There were some rejections, you said? A. Yes. [116]

Q. They claimed a rebate and took 1,200 bales?

A. Yes.

Y. You allowed a rebate on 200 bales? A. Yes.

Q. They kept the 200 bales, but asked a rebate?

A. Yes. I cannot say any more than that I offered to take the hops back and they said as they had them already in their brewery, they would rather keep them there and have an allowance on them. I

made that allowance as a matter of policy. I have made a tabulated statement of the Government's report as to the quantity of hops raised in 1911 and 1912.

Mr. POWERS.—We object to that as irrelevant, incompetent and immaterial.

The COURT.—Objection overruled.

Exception.

The world's hop crop was 149,000,000 pounds, and in 1912 it was 221,000,000 pounds. To be exact, in 1911, 149,800,000 pounds, and in 1912, 220,900,000 pounds.

Mr. DEVLIN.—Pretty near twice as great in 1912. A. 50% larger.

Q. What was the product in the United States in 1911 and 1912?

Mr. POWERS.—I make the same objection to that.

The COURT.—Same ruling.

Mr. POWERS.—Exception.

Exception #25.

In 1911, in the United States it was 44,000,000 pounds, and in 1912, 55,800,000.

#### Recross-examination.

The duplicates were substantially in the same condition as the duplicates produced by defendant. I do not know who was present at the time I had the conversation about the sale of my contract. [117] It was in his office. I do not recollect whether any other person was present or not. With reference to the conversation with Mr. Zaumever, no one was

present. The relative cleanliness of a hop is shown in the sample two years afterwards in the same way it would be a short time after its picking.

There were some bad hops in the Russian River district in 1912. Some of the Sonomas were very bad. The Sonoma crop was mixed. Some were very good and some were very poor.

If the cold storage was right and the hops were good when they were put in the cold storage the berry would be kept firm for two years.

- Q. If a district happened to produce all bad hops in any one year, the best of that crop would be considered choice?
  - A. But we do not run across that condition.
  - Q. Some of the Sonomas were bad that year?
  - A. They were mouldy, that is lousy.
- Q. Suppose the entire crop had been lousy, then, of course, there would have been the relative degrees of goodness of those hops?
- A. The best average crop of the year would be the choice. That is a condition you do not run across.
- Q. If you should happen to run across such a condition, where the entire crop was mouldy, a man would have to take the best of that mouldy crop as a choice?
- A. If he confined himself to a particular locality, and the choice hops of that locality were all mouldy, he has got to take mouldy hops.

Referring to a telegram dated September 27th, 1912, you sent a letter dated September 28th, 1912, reading as follows:

San Francisco, Sept. 28th, 1912.

PABST BREWING CO.,

Milwaukee, Wis.

Gentlemen:-

We confirm telegraphic correspondence as follows: [118]

Sent to you Sept. 27:

Mr. George wires us you are now negotiating resale to other dealers of the two thousand bales cosumnes we sold you and that you wish all these Hops held on coast until you order hops forwarded period We are willing hold these hops on coast if you accept deliveries now on coast less freight allowance period. We are willing to resell the two thousand bales for your account or we are willing to exchange all or part for nineteen twelve oregons or vakimas at difference in price or we are willing make term contract for vakimas and cancel sale Cosumnes twelves period. You can appreciate that we must know your conclusions now so we can complete our nineteen twelve deliveries to other buyers please wire us fully direct to San Francisco period We do not think you can rush sale of two thousand Cosumnes as all big deals at present are for Oregons for export.

Received from you Sept. 28.

We will not accept deliveries now or make any trade before full line samples submitted to us may consider cancellation of contract with offer from you. SENDING SAMPLES.

We sent you to-day by first class special delivery mail twenty samples of hops including a number of

samples of 1912 cosumne hops of the contracted quality. We are quite willing to deliver you hops from California districts other than cosumnes if you prefer to change though because of the mixed quality and considerable mould in the Sonoma and Russian River districts this year, we do not wish to handle hops from those districts.

We will thank you to wire us upon receipt of the above samples numbered 1 to 20 all the numbers that you prefer and please give us the numberd of your preference and we will fill your order as much as possible in the order of your preference.

In case you should resell all or any part of your 2000 bales we suggest you do not make your sale on samples as you might have a rejection from your buyer if you sell other than according to your purchase which was on quality.

You will find all above samples sent you far better than 1911 crop and we hope therefore that you will conclude to use your 2000 bales instead of reselling.

We regret that we will not be in position to cancel the trade on 1912's though if you make us any proposals for exchange for other hops either pacifics sacramento's or foreigns we will do our best to meet your wishes, though we would need to have the offer for some change from your good selves.

Awaiting your telegraphic advice of your preference of the 20 samples mailed you, we are,

Yours faithfully,

E. CLEMENS HORST CO.

The samples referred to in that letter were sent to

us because [119] we demanded the samples before shipment was made. That is embodied in our purchase order #54,808.

- Q. You may state the fact, if any there be, whether or not the— A. Yes.
- Q. Subsequent to that you asked them to send you samples and they sent you these four samples numbered from 21 to 24? A. Yes.
- Q. Did you submit those samples to the farmers or growers that were on the stand? A. No, sir.
- Q. Those growers had no opportunity in October to compare those samples with the ones that you showed them?
- A. No, sir. A lot of growers signed statements and we got them before we ever got those four samples. A good many of these signed statements we got before we got these four samples.
- Q. You commenced to prepare for this lawsuit before you knew the samples had been rejected?
- A. I prepared for the lawsuit before we picked the crop. I have had considerable experience in litigation. I always prepare for lawsuits immediately on their appearing in sight. Whenever the market drops.

# [Testimony of T. L. Conrad, for Plaintiff.] Testimony of T. L. CONRAD.

Witness was sworn and testified as follows:

Direct Examination.

# (By Mr. DEVLIN.)

I am by occupation a hop grower and have worked for the plaintiff for twelve years in the Cosumnes dis-

trict. I have had charge of their ranch for the last ten years as general superintendent, seeing that the hops are properly picked, cured and put in bales and shipped. I dried hops for Horst Bros. before I went out there. Have been in the business for fifteen years and am now 34 years old. I am familiar with the different ranches in the Cosumnes River district and this consists of 1000 to 1100 acres. I had charge of the [120] picking of the 1911 and 1912 crop. We used all reasonable care to cure and pick them. We picked the hops by machinery and the clean hops were kept separate and we baled them separately so as not to get in with the other hops of a particular quality. In general hop growers mix all the hops together. We baled 4,300 bales that year of which 200 bales were clean-ups. It made them 4,100 bales better because we took out the clean-ups. The hops were air dried. We dried them at a lower temperature and they retained the flavor and quality of the hop better.

Q. What would you say as to the quality of the crop of 1912, the 4,300 bales, as to being choice hops or not?

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, and calling for the conclusion of the witness on a matter that he is not shown to be expert in.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

# Exception #26.

They compared favorably with the 1911 crop.

They were clean picked. As cleanly picked as the 1911 crop. Our hops were just as clean as anybody's; if anything they were cleaner. I examined the hops of Grimshaws, Kennedy, Murphy and Rooney. If anything ours were cleaner than theirs. I have examined samples one to twenty and samples 25 to 38.

Q. What would you say about their quality as being choice hops or not?

Mr. POWERS.—I object to that on the same ground as the last objection.

The COURT.—Objection overruled and exception noted.

Mr. POWERS.—Exception.

# Exception #27. [121]

I found them to be choice hops. I did not find an undue proportion of leaves. I think they were very cleanly picked. Our hops were not damaged any by rain that season. They were picked before the rain commenced.

Cross-examination by Mr. POWERS.

Q. Was there any reason why your hops should have sold at a less figure than anybody else's that year?

Mr. DEVLIN.—That is objected to on the ground that it assumes a fact that is not true. The hops were sold at a less figure because the market dropped, as shown by the testimony of the witness, and that had nothing to do with the sale or price.

The COURT.—I will sustain the objection.

Mr. POWERS.—Exception.

# Exception #28.

- Q. You say that these hops were better, if anything, than Mr. Jack's hops?
- A. I do, yes, sir. I did not examine Mr. Jack's hops very closely, but I saw them when they were picking them and ours were better in color, they were as good in lupulin.
- Q. Take an air-dried hop and a kiln-dried hop after they came away from the ranch, could you pick out an air-dried Cosumnes hop from a kiln-dried Cosumnes hop?
- A. I am not a hop expert, no, sir. The Horst Cosumnes hops of 1911 and 1912 were practically of the same quality. They were baled and handled in the same way. One crop was practically as clean as the other. Very few of the Horst crop is picked by hand. A few of the hops were picked off of the vines after they came from the machine. They were all put in the machine and picked. The machine picks them cleaner than by hand. I have been handling the picking machine for 6 years. I consider sample 33 an absolutely clean picked hop. [122] With reference to sample 38 I cannot see much difference in them. They are practically the same. Sample 21 is a clean picked hop. I cannot see very much difference. One has a stem, but that is liable to get in any sample.
- Q. Is sample 21 a better looking hop than the other? A. I cannot say, I am not an expert.
  - Q. Are the berries firm and whole in sample No.

21? A. They are very good, yes.

Q. How would you say the berries are in the others? A. Practically the same.

# [Testimony of Theodore Eder, for Plaintiff.] Testimony of THEODORE EDER.

Direct Examination by Mr. DEVLIN.

I am general superintendent of plaintiff and have been since 1898. I have general charge of all their ranches in California, Oregon and British Columbia, and I am familiar with the hop ranch of plaintiff in the Cosumnes River. I have been around the ranches out there. I knew the crop of 1910, 1911 and 1912. I know what a choice hop is in the trade.

- Q. What do you understand a choice hop to be?
- A. The best of the section.
- Q. If there a better quality then choice hops known to the trade? A. Yes, it is fancy hops.
  - Q. Choice is an elastic word?

A. There are hops of first pick and second pick, and they are choice hops, but are not exactly alike.

Q. What have you to say as to the quality of hops raised by E. Clemens Horst and Company in the Cosumnes District in 1912, as being choice or otherwise?

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, and calling for the conclusion of the witness on a matter which he is not found to be expert in. [123]

The COURT.—Objection overruled.

(Testimony of Theodore Eder.)

Mr. POWERS.—Exception.

# Exception #29.

- A. I believe they were choice. I am satisfied that the 1912 crop was better than the 1911 crop. I know Mr. Zaumeyer. I met him on the train in 1912. I told him we would make a special effort to give him clean hops and we did. He accepted hops of the 1911 crop without any complaint.
- Q. I will ask you whether the hops for 1912 grown on the Horst ranch were cleanly picked as that term is understood in the trade?
- Mr. POWERS.—I object to that on the same ground as the last question unless he knows that they were submitted to us, it would be irrelevant, incompetent and immaterial.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

#### Exception #30.

I know of certain hops to be segregated in the 1912 crop which were clean-ups. There were about 200 bales. They were of different quality. The general system is to pack all of the hops together, not separating them. By separating some of the hops from clean-ups we get a better quality. I have examined sample 20 and samples 25 to 38 and can pass an opinion upon them. I believe them to be choice hops and to be cleanly picked. It is impossible for any person to tell what their flavor is or in regard to their lupulin. Stems can get in the samples and the samples are bound to break where the stems are. They do get in once in a while. I call samples 33 a clean hop. I consider sample 38 a choice hop. It

happens to be one of those accidents where you have a seam in the middle. I would say they do compare with sample 21 as to cleanliness. I do not see much difference.

It was thereupon stipulated on the part of the defendant that upon plaintiff's counsel stating that certain witnesses would testify [124] to certain facts concerning the experience and capacity of experts that the witnesses would be deemed to have testified in the same manner as the other growers, and that defendant should be deemed to have the same exceptions and objections, and that the witnesses would be deemed to have the same experience and qualifications as the experts and no more than the grower witnesses who have already testified and that the defendant would have the same objections and exceptions to their testimony as not being expert.

Thereupon Mr. Devlin offered the testimony of A. E. Murphy, who had examined five samples on October 23d, 1912; Mr. Bietzel, who had examined seven samples on October 23d, 1912; A. A. Merkley, who had examined 26 samples; A. A. Hawk, who had examined 25 samples; Mr. Charles Colquhoun, who had examined 26 samples on November 26th, 1912; John Chipps, who had examined 25 samples on November 25th, 1912; George Zongley, 25 years' experience, who had examined 25 samples on November 26th, 1912; W. J. Castleman, 20 years' experience, who had examined 25 samples on November 26th, 1912; William Johnson, 23 years' experience, who had examined 24 samples, November 23d, 1912;

H. Gerber, 30 years' experience, who had examined 24 samples; A. T. Murphy, 2 years' experience in the Cosumnes district, who had examined 25 samples on November 18th, 1912; William Fay, hop grower, ten years' experience in Cosumnes district and American River district, who had examined 25 samples on November 18th, 1912; E. L. Kunz, 29 years' experience, who had examined these samples; W. L. Zednetter, 6 years' experience; P. W. Rooney, five years' experience; E. T. Rooney, five years' experience on the Cosumnes, who examined samples; J. Calverhouse, five years' experience on Cosumnes, who examined samples; B. B. Hoofer, 30 years' experience on the Cosumnes; J. A. Crowell, 6 years' experience as hop grower on Cosumnes; J. A. Pond, 28 years' experience as hop-grower in Yolo County; J. Z. C. Lattin, 2 years' experience on American River and [125] 10 years on the Cosumnes; Anton Mento, 6 years on the Cosumnes and Del Paso: George Minkey, 36 years at Mills, California, and on the American River; Mathew Kennedy, 8 years experience in the Cosumnes; Ezra Castle, 10 years experience on the Cosumnes; Jacob Castleman, 20 years' experience on the Cosumnes and at Perkins and in Yolo.

# [Testimony of F. G. Ernest Lange, for Plaintiff.]

F. G. ERNEST LANGE was sworn.

Direct Examination by Mr. DEVLIN.

I handle the general office work and special work for Mr. Horst and have been so connected for the last ten years. I have bought and sold hops. A

great many samples of hops come to our office. Thousands of samples in a year. They have to be graded, and I am handling hops all the time. Outside of that I have graded hops on the ranches. We have a large room in Mr. Horst's headquarters in San Francisco, where hops are kept. It is part of my duty to grade the hops as to determine their quality as to being choice or otherwise. I have been thus engaged off and on during the last ten years. All of our lots on the ranches are lotted with special numbers. Each ranch has a special series of lot numbers and tags are put on the bales in such a manner that they are put on there permanently. They are put on with hog rings. All of the hops are lotted up in lots of 100 bales or less. As soon as they are lotted up, tag samples are taken from each lot, usually one samples for every twenty bales and those samples are marked by the person who takes them off the lot number, and the lot from which they were taken. We have a couple of ranches at Cosumnes; several at Perkins, six miles from Sacramento; a ranch at Wheatland in Yuba County; a ranch in Oregon, at Independence, and a couple of ranches in British Columbia, and one in Ukiah. I have been on nearly all the California ranches. I have graded hops from all of them down in the office. [126] The lot numbers for the Cosumnes series run from 450 to 550, and the samples marked 450 to 455 I know comes from one of the ranches in Sacramento County. The other ranches have their numbers. In keeping our books the lot number of the hops sold

shows that they belong to the Cosumnes ranch and I can tell the lot number, whether the hops belong to the Cosumnes district or any other district. We can go all through the books and tell. They are retraced in that way. We have offices in the eastern part of the United States and an office in London. The main office is in San Francisco. Our sales agents send in letters or telegrams reporting the sales, and they are entered up on the books and entered in the sales record. I am familiar with the books of the E. Clemens Horst Company. At different times I have done work on the books.

Q. You are familiar with what we call the 2,000 bales sold to Pabst & Company? A. Yes.

Q. And the entries that appear upon the books relating to that sale and the amount received from those hops after November 4th, 1912? A. I am.

Q. Have you made an examination of the books with the purpose of ascertaining the price at which they were sold and the person to whom they were sold?

Mr. POWERS.—I object on the ground that it takes for granted that there is in evidence a specified 2,000 bales set aside to Pabst & Company and there is no such evidence. That is what I have been trying to get at.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

# Exception #31.

A. I have. I have made examination of the vouchers and memorandums of sales sent on by the agents

selling these. All of our hops in the United States and Canada are insured under floating insurance, [127] and it covers all the hops, no matter where they are, in any warehouse, or in any of our warehouses on the ranches. There is a flat rate for everything.

Q. What books did you have to examine to do that?

Mr. POWERS.—I object to this as irrelevant, and immaterial. I also object with reference to taking a certain number of hops that he thought was the 2,000 bales sold, and a certain other number of hops that he thought they should be used as the basis of comparison, with these 2,000 bales in order to determine the amount, and that takes for granted that there is in evidence facts showing the 2,000 bales were set aside to the Pabst people, and facts showing that there were certain other hops with which they were to be compared. These facts are not in evidence.

The COURT.—The basis of my ruling a few moments ago was this: There is evidence here to show that there were 2,000 bales on hand appropriated to this contract,—that is, if the jury so find. If the jury finds that there is no such evidence, then, of course, this evidence as to the relative amount of the insurance would fall. I will overrule the objection.

Mr. POWERS.—I object to it on the ground that it is not the orderly procedure. That the proper procedure should be to prove that there was a certain

2,000 bales set aside and that there were certain other goods that were covered by the same insurance.

Mr. POWERS.—We note an exception.

# Exception $#31\frac{1}{2}$ .

A. I examined the books to find out to whom the hops were sold after November 4th, 1912, and I figured out the average number of days and taking the value of the hops, I figured the insurance rate at the floater rate, that is \$1.25 per 100 pounds per annume. I also figured the interest. I went through our books and found [128] the prices at which we had sold the 2,000 bales to other parties after November 4th, 1912.

Mr. POWERS.—I move that the answer be stricken out as not responsive to the question.

The COURT.—The motion is denied.

Mr. POWERS.—Exception.

# Exception #32.

Mr. DEVLIN.—(Q.) Did you figure any interest on losses?

A. I figured the interest on approximately \$2300 difference in the price between the price we sold to Pabst and the price we sold to the other parties.

Mr. POWERS.—I move that portion of the answer be stricken out which the witness says was the difference in price for which they would have been sold if they had been sold at 20¢ on the ground that it is not responsive to the question.

The COURT.—Motion denied.

Mr. POWERS.—Exception.

#### Exception #33.

We figured the interest at 6%. The sale to Pabst Brewing Company was a coast price, and most of the sales made of the 1920 bales of the 2,000 bales sold other parties after November 4th, 1912, were sold on delivery prices. Delivered at the town where the brewery is situated. There are various freight rates covering those sales, and the tare is figured at 5 lbs. per bale, which is the usual trade custom, and the freight on the tare is figured on the amount of pounds of tare at the freight rate under which the invoices were made out to the various persons who bought the hops.

Mr. POWERS.—I move to strike out that portion of the answer referring to the fact that most of the sales were sold on delivery prices at the brewery, on the ground that it takes for granted a fact to be in evidence which is not in evidence, and is necessarily hearsay. [129]

The COURT.—Motion denied.

Mr. POWERS.—Exception.

#### Exception #34.

Q. Did you have to examine many books and vouchers to make up that?

The COURT.—Mr. Horst has testified where these sales were made.

A. I did. I also figured up the items of storage. A number of the hops were on the coast on November 4th, and a number of bales were in our warehouses, and we figured on the charges at the regular monthly

rate charged by the warehouses for the number of months which those hops were stored there. There are certain miscellaneous charges.

Q. What is the aggregate of the miscellaneous charges?

Mr. POWERS.—We object to this on the ground that it calls for hearsay evidence as to what the charges were, and whether the charges were in any way connected with these 2,000 bales. These are expenses made in the east and paid out by somebody else. The purpose for which they were paid out can only be determined by the man who paid them out. Certain entries were made by the witness and until they are shown to have been in some manner connected with these 2,000 bales by someone who carried on the transaction, it is irrelevant, immaterial and hearsay.

The COURT.—Let us know in the first place what these miscellaneous items are, then I will be able to understand the objection.

A. These were storage charges, local freight, cartage and way, sampling, repairing and any other charges like that that we could have the vouchers to cover.

The COURT.—In the regular course of your business? A. Yes.

Q. And appear in your books in the regular course of business? A. Yes.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #35. [130]

A. We know just what lot these items cover.

Mr. POWERS.—I move that that be stricken out as not responsive to any question, and being impossible for this witness to know of his own knowledge.

The COURT.—It may not be directly responsive to any question, but it is enlightening all the same.

Q. Have you stricken out of that list all expenses in connection with trips to Canada and things of that kind?

A. Mr. Devlin, that would not go under these miscellaneous charges. That would go in under overhead. There are discounts to brewers for cash payments.

Q. What is that for?

A. 1% discount to the Eagle Brewing Company and 1% discount to the Gulf Brewing Company. That is the usual custom to discount for cash payments. Those actually appeared in our books. In our ledger under bad debts and uncollectible account, appears the sum of \$262.19. There is a difference between the amount of the invoices and the amount we collected.

Mr. POWERS.—I object to any testimony as to losses as I understand it, there is no rule that permits a man to gamble with the goods. He sells them and takes his own risk when he makes a sale, and the account becomes his. It is in no way connected with the defendant in this case. Any sales that took place on which there were losses is irrelevant.

The COURT.—I do not think that can be the rule. If, by reason of a breach of the contract for the pur-

chase of goods, the man left with those goods on hand, the law requires him to take all reasonable means with reasonable expedition, adopting. of course, only the ordinary methods of business, to dispose of those goods at the best figure that he can procure for them. That he owes to the one with whom he had the contract of sale, to protect him from damages as far [131] as possible. In other words, you cannot, as I said yesterday, permit those goods to go to waste, and charge him with the whole loss. Now, if taking the usual and ordinary methods, and using all of the usual and ordinary precautions of business, he suffers a loss in the same way that a man does that carries on his business in the usual and ordinary way, he is entitled to that loss accruing on the goods which were left on his hands by reason of the breach of the contract; and in the nature of things he is entitled to recoup any loss, using all due and reasonable diligence to make the most out of the goods that he can under the circumstances.

Mr. POWERS.—I will add to my objection the further ground that it had not been shown that this loss occurred upon the 2,000 bales or any portion of the 2,000 bales, that were set aside to the Pabst people.

The COURT.—The witness has stated in response to questions that they were with reference to these sales.

The WITNESS.—All of these charges were on the 2,000 bales.

Mr. POWERS.—My point is that there is nothing in the evidence concerning the 2,000 bales. I will take my ruling on it and my exception.

Mr. DEVLIN.—(Q.) Now, are there any other items besides the overhead? If not, explain the overhead in detail.

A. There is a list of bad accounts, uncollectible accounts.

Mr. POWERS.—I move that any testimony with reference to a loss of bad accounts be stricken out.

The COURT.—Motion denied.

Mr. POWERS.—Exception.

# Exception #36.

A. This is a different item. Those items were collected. We invoiced them at a certain price and got a less price. We had [132] to collect them through collection agencies and we got a less price. In these cases we have not been able to collect at all for them. We lost the money.

The COURT.—Were those sales made in the usual and ordinary course of business transactions of that kind? A. yes.

- Q. And the losses accrued through circumstances that you were not able to avoid?
  - A. They were beyond our control
  - Q. Bad accounts you call them?
- A. Yes. At the time we sold them, the breweries were considered all right, and there was nothing to show that we would not get our money from them. They were sold in the regular course of business, the same as any other.

Mr. POWERS.—I object to any testimony as to bad accounts on the ground, first, that there is no particular 2,000 bales set aside to the Pabst people, and when there were 3,000 bales on hand there was nothing to show, at the time the original sale was made, that these were sales made for the Pabst Company account, or the goods of Pabst & Company. Second, when the Horst people sold those goods, they then took those accounts in place of the claimed account against the Pabst people, and it is immaterial and irrelevant, and based upon hearsay testimony, as to whether these people are able to pay or not.

The COURT.—I will overrule the objection.

Mr. POWERS.—Exception.

# Exception #37.

I have besides the overhead charge, a charge here for interest on the unpaid accounts at 6%. On my statement I show a list on the 2,000 bales between the price sold to Pabst & Company and the amount collected from the brewers to whom we sold the 2,000 bales after November 4th, 1912. That was the price sold to Pabst & Company and the price at which we sold the hops. [133]

- Q. In taking into consideration the overhead expense you have charged for the selling cost?.
  - A. Yes.
- Q. Without taking any of the expense of the San Francisco office? A. No, sir.
- Q. Please state what you put in the selling cost and how you arrived at it to be distributed to these 2,000 bales.

A. All of our agents, or salesmen, turned in expense slips, covering all the charges of the office for the different periods, and those expense slips come in either every day or once a week in the ordinary course of business all the time. Those show all the eastern expenses. I have tabulated the expenses leaving out such items as estimates for office force and things like that, and the expense slips were turned in yesterday.

Q. Between what dates from November 4th?

A. November 5th, 1912, to June 30th, 1913. That is the selling season for the 2000 bales.

Mr. POWERS.—We object to this on the ground, first, that the charges have not been testified to by any person who was familiar with the reasons for the charges being made; that they were made with reference to the New York office and the Chicago office, and they carried on a multitude of businesss; that any knowledge that this witness or anyone else has is necessarily hearsay; that whether any one of these expenditures is in any manner connected with Pabst Brewing Company is necessarily hearsay; that the witness does not pretend to have had any knowledge for the reason for the expenditure, nor the manner in which those expenditures were connected with the Pabst goods. But the principal reason that it is not admissible is that is is necessarily hearsay.

The COURT.—How are you able to know that these expenses relate [134] to these hops that you are testifying about?

A. On the 2,000 bales?

Q. Yes.

- A. They refer to all the hops sold by the offices during that period.
- Q. And the overhead expense relates to any other business transaction during that period, and you are apportioning them up?
- A. The amount sold by the other offices the total amount of bales of hops sold during that period.
- Q. And the percentage that would apply to the 2,000 bales you arrive at simply by figuring?
- A. The percentage that would apply to the 1,346 bales.

Mr. DEVLIN.—We do not confine that to the 2,000 bales. We charge that against 1,300 bales, and some odd, out of the 2,000 because the 7,000 bales we will admit,—we will have that explained. We do not charge for the full 2,000.

Mr. POWERS.—We object to it on this same ground.

The COURT.—You are repeating your objection. I have already ruled on it. Wait a minute and give the Court a chance, and I will try and rule on it again. The only means, then, by which you arrive at these figures is by taking a certain percentage of the overhead charge in proportion to the number of pounds of hops sold, the 1346 bales, and you take the proportion of the 1346 bales to the entire amount of business transactions, or the volume of business, during the period that you were engaged in selling those 1346 bales?

A. The entire transactions, the volume of business

(Testimony of F. G. Ernest Lange.)
done through those offices. These costs refer to those offices only.

The COURT.—I do not think that is admissible.

Mr. DEVLIN.—Let me make it a little plainer. Some of the hops of the 2000 bales were sold in San Francisco, 200 bales or so. [135]

A. Yes. There is no charge made for that at all.

Q. There were certain number of those bales, about 500 and odd, that were sold on prior contracts?

A. There were 497 bales sold on prior contracts and we have not made any overhead expenses on them.

Q. Beginning on November 4th, 1912, until you finished selling the remainder of the bales, about 1300 and some odd bales, were there certain expenses incurred in New York and Chicago and eastern states in selling the remainder of the 2,000 bales of what we call the Pabst hops and other hops?

Mr. POWERS.—I object to that as hearsay.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

### Exception #39.

A. Yes, sir. That appears on the books of the company. We have not charged our own commission for selling the hops.

Q. Now, do you know if, for instance, I should deliver 2000 bales of hops to Horst & Company to sell, such as these hops, what would be the usual and customary price per pound for selling such hops?

A. About a cent and a half a pound.

Q. And in lieu of a cent and a half a pound, you

are simply giving here a proportion of the overhead charge in the New York office for selling these 1300 bales of hops, is that correct?

Mr. POWERS.—I will object to this line of examination until my question has been ruled upon by the Court.

The COURT.—I think this is proper. He is trying to ascertain the facts.

Mr. POWERS.—Exception.

# Exception #40.

A. Yes.

- Q. Have you eliminated from the overhead charge the hops sold in San Francisco, the 200 bales? And the expense of the San Francisco [136] office and all of the expenses connected with the delivery of the 497 bales? A. Yes.
- Q. Have you examined the vouchers turned in to the firm for the expenses of selling these hops, etc. and those expenses appear on your books?

A. Simply as an expense account. I am familiar with the delivery of these hops to eastern agents after November 4th, until the last of those we call the Pabst hops were sold. The statement showing hops on hand I got from the books. I made an examination for the purpose of ascertaining the amount of hops of the 1912 growth at the Cosumnes ranch on hand in November, 1912, and the amount sold The number of bales of hops in 1912 that were on hand on the Cosumnes ranch in November 4th, 1912, was 3,062 bales. Some of them were at the Cosumnes ranch in our warehouses; some of them en route

to the east; some of them were at Milwaukee and some of them at Chicago and same of them at New York. I have charge of the stock room and the books, and I know the stock that goes out and where it goes to, and I know where the 2000 bales of hops were sold, and that afterwards returns were made by our agents stating where they were sold and the prices that they obtained, and I know the salaries that were paid to our salesman during that time, from the books, and I know the expenses that were incurred.

Q. And they related to the 2000 bales of hops, and also to the other hops?

Mr. POWERS.—I object to that as being hearsay. The COURT.—Objection overruled.

Mr. POWERS.—Exception.

#### Exception #41.

The COURT.—You know that in the ordinary course of business? A. Yes.

Mr. POWERS.—Exception.

# **Exception** #42. [137]

Q. And did the corporation of E. Clemens Horst Company pay these expenses and these salaries, based upon those statements?

A. Yes. They were paid before this suit was commenced in the ordinary and usual course of business.

Mr. DEVLIN.—I will take your Honor's ruling now, if you think it is not proper.

The COURT.—With this explanation I think it is quite proper.

Mr. POWERS.—Exception.

# Exception #43.

Q. Did you make a calculation, without giving it now, as to the proportion of the expense these 1300 bales bore to the total expense, that you have just described?

Mr. POWERS.—I object to it as irrelevant, and immaterial, calling for the conclusion of the witness on a question of law, which he is not competent to decide, and it is necessarily based on hearsay as to services performed by various people in connection with the Pabst goods, and in connection with other goods, and as being an attempt to put into the record evidence which should be obtained from the men who made the expenses, and thus know why the services were performed and what the expense was. For instance, there was a Christmas present included amongst these. There are stenographers' salaries included amongst them. There is a trip to Chicago.

WITNESS.—The items of expenditures with reference to the business of this corporation so transacted in New York or in any other place in the east are sent on here and entered in our books here in San Francisco in the regular and orderly course of business. The reports come daily and weekly. A slip is made out by each salesman every day, but they do not always send them then.

The COURT.—Under those circumstances I think it is perfectly competent. The nature of the business transactions of this corporation involve certain overhead charges as they are called. There is a

charge for regular salaries and for the expense of transacting [138] the business. Now, that business was, and the witness is competent to testify, of a certain volume, and making up a part of that volume was the disposition of this 1346 bales of hops which it is claimed here was disposed of on behalf of a broken contract with the Pabst Company. Now, they propose, and I think they are correct, to ask for, if they are entitled to damages, if the jury finds they are entitled to damages, the proportionate amount of the overhead charge which would apply to transactions involved in disposing of the 1346 bales of hops being returned to them. I think they are entitled to it, if the jury finds that they are entitled to recover at all. I will overrule the objection.

Mr. POWERS.—Exception.

# Exception #44.

The sales book is in daily use. It took me five or six days to make this examination.

Q. Have you made correct estimates on the basis that you have given to the Court for your calculations?

Mr. POWERS.—I object to that on the ground that it calls for the conclusion of the witness on a question of law. There were sales of certain portions of these 2000 bales during the months of November, December, January and February, and the amount of goods left was, of course, diminishing. Now, the witness is asked whether or not he made a correct statement of it.

Q. Did you figure out mathematically correctly the

(Testimony of F. G. Ernest Lange.) amounts upon the basis you have given in your testi-

mony?

Mr. POWERS.—I object to that on the ground already stated, and on the further ground that it is necessarily based on hearsay evidence.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

# Exception #45. [139]

A. Yes. I was personally familiar with the hops and samples of hops taken from the 1912 Cosumnes crop. I did not see all of them, but I saw some of them. I did see the samples numbered 1 to 20 and 25 to 38 that went to the Pabst Company.

Q. In the trade what is meant by choice hop?

Mr. POWERS.—I object to that as irrelevant and immaterial, calling for the conclusion of the witness upon a matter which he is not shown to be expert in. He has not bought or sold hops.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

# Exception #46.

A. The first average of a particular section.

Q. What do you say as to those samples being choice hops or otherwise.

Mr. POWERS.—Same objection.

The COURT.—Same ruling.

Mr. POWERS.—Exception.

#### Exception #47.

A. I would say they were choice Cosumnes hops. I do not believe all of the samples are Cosumnes hops, but the most of them are Cosumnes hops, and

they are all choice hops. All the hops grown on the Horst ranch were air dried.

Q. Please state what your examination discloses to have been the price obtained from the resale of the 2,000 bales of hops that it is claimed was sold to Pabst Company and refused to buy it.

Mr. POWERS.—We object on the ground that it is irrelevant and immaterial, based on hearsay evidence, based on a conclusion of law as to what is a proper method of apportioning; based upon an improper theory that the 2,000 bales shall pay a proportion of the entire overhead expenses from November 4th, 1912, until the last bale was sold.

Mr. DEVLIN.—I will change that question. [140]

Q. Have you made an examination of the books of the plaintiff for the purpose of ascertaining what the books show was the loss that had been sustained by the plaintiff measured on the assumption that the hops were sold to Pabst & Company at 20¢ per pound, and what plaintiff actually received for the hops, together with the cost of reselling them. Have you made such an examination?

A. Yes. And I have made the calculation just described for the purpose of ascertaining that fact.

Q. Will you please state the result?

Mr. POWERS.—I repeat the objection, that it is based on hearsay evidence as to what was the cause, and the reason for the several expenditures reported from the Eastern states.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

## Exception #48.

A. The 2000 bales were resold at an average price of .1366 $\phi$ 

The COURT.—We do not want the average rate at all. We want the actual amount you received on the sale of these hops. Based on the figures that you have heretofore given.

A. \$23,584.80. \$32,651.73 plus several items that I I have tabulated in accordance with my previous testimony. I figured the overhead to be \$4459.30.

Statements referred to by witnesses were three sets of tabulations reading as follows: ]141[

## CHICAGO OFFICE EXPENSES.

DATE.	AMOUNT.			
	Nov. 5	, 1912, to June	30, 1913.	
Nov. 5.	\$ 8.96	26	10.00	
5	.50	27	. 60	
6	3.80	27	7.40	
6	9.70	28	8.39	
7–8	7.15	29	350.50	
7	1.50	29	4.35	
8	2.20	30	10.64	
9	48.95	30	10.50	
9	1.35	Dec. 2	1.65	
9	35.20	2	.50	
11	.50	3	4.87	
11-12-13	18.95	3	9.35	
12	1.45	4	5.05	
13	.20	4	5.25	
13	2.10	5	4.52	
14	.50	5	121.12	
14	2.35	6	.50	
15	1.35	6	3.10	
15–16	20.60	7	10.40	
16	.50	7	8.60	
18	9.65	9	10.36	
19	.70	9	8.55	
20	.50	10	2.70	
21	.50	10	11.50	
17–21	6.40	11	1.27	
22	.50	12	3.00	
22	.95	<b>1</b> 3	2.30	
23	5.25	13	1.38	
23	10.30	14–16	10.85	
25	.50	14	2.50	
26	12.90	[142]		

164 Pabst Brewing Company vs.

Date	Amount	Date.	Amount.
Dec. 16	\$ 1.75	7	1.50
17	.50	7	.58
17	10.05	8–11	2.00
18	12.50	8	3.25
18	1.85	9	1.55
19	16.55	10	29.20
19	2.82	13	12.15
20	2.25	14	.50
20-21	14.75	14	1.10
21	4.00	14	.50
23	8.29	15-30	10.00
23	3.00	15	11.00
24	.30	16	.60
24	13.50	18	13.75
25-26	6.62	20	1.15
26	3.00	21-22	1.41
27	1.60	23	.40
27	.50	24	1.85
28	.50	25	12.80
28	10.30	27	3.88
30	352.00	28	5.40
30-31	.60	29	8.93
31	1.50	30	6.70
Jan. 1	11.50	31	2.50
2–3	5.54	31	.70
2	17.00	Feb. 1	.50
4	39.05	1	12.80
4-4	10.30	3	.80
6	2.50	21	3.50
6	2.18		3,30

La Collocio Li Cist Collobolida	E.	Clemens	Horst	Company.
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Date. Amount. Date. Amount. \$ 7.00 .50 Feb. 4 25 10.50 5 .88 26 5 1.50 2.00 26 5 13.69 27 5.15 6 .50 27 .50 6 3.74 28 8.10 7 350.50 .50 28 7 5.90 5.76 Mar. 1 8 46.10 1 13.75 2 8.75 8 19.55 3 10 .50 15.97 11 4 7.76 1.48 12 .40 4 1.50 13 5 4.35 7.09 14 5 5.50 7.08 14.43 15 9.00 6 10 - 1516.50 6 2.00 17 .50 7 .85 17 2.00 7 .50 18 4.94 8 13.00 18 8 1.50 .50 19 .50 10 39.91 19 10 47.25 .50 20 1.00 4.53 11 20 1.70 1.50 12 21 13.04 13 3.15 21 10.95 3.44 14 22-24 1.03 15 12.94 24 .50 3 1.31 25 2.78  $\lceil 143 \rceil$ 

166 Pabst Brewing Company v	166	Pabst	Brewing	Company	vs.
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Date.	Amou	int.	Date.	Amount.
Mar. 17	\$ 1	.03	10	6.31
18	. 2	2.68	10	.50
19	7	.91	11	6.15
11–19	5	00.	11	.50
20	6	.77	12	13.02
21	7	.60	14	.70
22	13	.85	14	.74
24		.92	15	.50
25	3	.95	15	2.23
27	8	.25	16	.50
28		.50	16	40.10
29	13	.14	17	.50
31		.50	17	.50
31	350	.50	18	2.23
Apr. 1	7	.33	18	.50
1		.50	19	13.75
2	7	.58	21	15.45
<b>2</b>		.50	21	2.83
3	2	.55	22	.71
3	2	.00	22	.55
4	23	.00	23	.50
4	10	.50	23	.50
5		.40	24	.45
5		.40	24	.50
7	. 1	.25	25	.50
7		.50	25	.60
8	2	.93	26	12.90
8	10	.45	28	4.51
9		.50	28	.40
9	1	.50	28	5.96

E. C	lemens	Horst	Company.	
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167

	27. 0 0000000 11	or or company.	200
Date.	Amount.	Date.	Amount.
Apr. 29	\$ .60	21	10.58
29	8.41	21	2.25
30	6.56	22	17.65
30	350.50	22	10.50
May 1	6.60	23	1.00
1	2.58	23	2.00
2	13.00	24	12.90
2	.50	24	.35
5	.60	26	5.55
6	1.10	26	.70
7	.50	27	.50
8	46.55	27	.50
9	.50	28	.50
10	14.10	28	.85
12	5.45	29	1.00
12	5.60	29	.45
13	1.25	31	390.55
13	9.40	31	12.80
14	17.51	June 2	3.45
14	2.00	3	5.90
15	.50	4	14.60
15	.50	5	8.80
16	.80	6	4.80
16	.50	7	8.35
17	12.80	9	13.00
17	.35	10	.45
19	10.70	11	.65
19	.60	12	.66
20	.63	13	.40
20	9.25	14	12.70
		E1447	

[144]

168	Pabst Brewing	Company vs.	
Date.	Amount.	Date.	Amount.
June 16	\$ .40	27	1.15
17	.35	29	8.00
18	.50	28	12.80
19-20	.90	30	1.10
21	16.20	Ex Ledger I. (	₹.
23	9.90	M. Salary	975.00
25	.40		
25	.50	Total	. \$5399.80
26	.55	[145]	

# NEW YORK OFFICE EXPENSE.

Nov. 4, 1912, to June 30, 1913.

Date.	Amount.	Date.	Amount.
1912.			
Nov. 9	\$ 21.43	Mar. 8	54.05
14	63.46	8	27.20
16	79.60	11	258.32
27	40.75	14	81.80
27	50.85	15	33.40
30	181.80	16	112.26
Dec. 6	102.70	Ex Ledger	
7	359.82	Nave's salary	
11	55.30	Nov./March	2200.00
16	84.95	Mar. 22	44.50
19	30.85	29	11.53
21	85.10	29	45.75
26	199.48	<b>A</b> pr. 2	147.95
<b>1</b> 913.		5	1.80
Jan. 4	100.60	5	40.65
8	9.70	12	263.98
8	274.78	13	11.15
11	54.70	17	10.99
17	56.00	19	44.40
21	109.42	19	1.20
21	46.75	26	44.24
30	111.90	26	2.40
Feb. 1	174.05	30	5.25
6	50.50	30	125.00
6	46.90	May 3	38.94
14	183.26	3	1.95
18	72.70	10	209.50
26	37.10	10	2.10
28	64.05	14	7.15

170	Pabst Brewin	g Company v	8.
Date.	Amount.	Date.	Amount.
17	49.45	11	7.35
17	16.25	14	37.45
19	10.90	14	1.90
21	7.15	21	1.60
22	11.20	21	16.08
		28	21.75
May 24	\$ 41.10	28	1.90
31	39.42	30	125.00
31	1.90	30	4.01
June 4	125.00	30	147.55
7	37.55		
7	1.60		\$7,462.37
10	180.30	[146]	

#### EASTERN MISCELLANEOUS CHARGES.

Date.	Amount.	Date.	Amount.
1912.		7	5.49
Oct. 12	\$ .92	11	6.00
12	1.07	11	.80
19	1.26	16	3.75
Nov. 20	2.50	17	6.00
20	4.00	17	5.70
21	3.65	20	10.00
22	1.00	20	10.00
22	.52	31	18.75
22	1.92	31	18.00
30	1.35	31	4.00
30	30.72	31	.45
30	2.05	31	28.16
30	9.60	31	.30
30	3.25	Jan. 4, 1913	72.32
30	.60	7	37.20
Dec. 2	26.06	21	8.16
2	2.25	21	3.00
3	1.35	31	42.70
10	10.00	31	5.25
7	9.00	31	2.80
7	3.66		

172 Pabst Brewing Company vs.

Date.	Amount.	Date.	Amount.
<b>1</b> 913.		11	.64
Jan. 31	\$ 8.00	12	8.00
31	.90	30	6.00
31	2.00	31	2.16
Feb. 1	.08	31	3.00
1	1.75	31	. 67
7	16.00	31	6.00
7	8.00	Apr. 1	8.74
21	4.50	16	1.04
28	11.44	21	15.08
28	.16	30	11.40
28	81	30	.50
28	.81	May 1	3.00
28	2.50	10	2.28
28	.50	31	.08
28	1.60	June 30	.75
Mar. 3	1.41	30	.02
3	9.00		
11	1.25		\$549.63
[147]			

To each of these tabulations was attached vouchers in the shape of bills containing items as a basis for each of the entries on the tabulated list:

As a sample of the vouchers attached, which were attached to the New York Office Expenses, are the following:

Bill of John J. Finn, Truckman, dated New York,
Dec. 2, 1912:
Nov. 6. 2 Bales Hops 33 St. to N. R. Whre\$3.00
13. 10 Bales 51 N. R. to Mallors 5/5 1.20
18. 1 do. do. do. Penn. R. R
19. 25 do. do. do 3.00
20. 103 do. do. do. N. Y. C12.36
21. 20 do. do. do. Eastern Bw 6.00
$\overline{26.06}$
Bill of Erie Rd. Co., Dec. 10/12:
Bill of Erie Rd. Co., Dec. 10/12: 12/7. To shipping 98 bales Hops Ex. Str. Day-
12/7. To shipping 98 bales Hops Ex. Str. Day-
12/7. To shipping 98 bales Hops Ex. Str. Dayton from 51 N. R. to Wehawken Same
12/7. To shipping 98 bales Hops Ex. Str. Dayton from 51 N. R. to Wehawken Same being repeated at P51.
12/7. To shipping 98 bales Hops Ex. Str. Dayton from 51 N. R. to Wehawken Same being repeated at P51.  Car 205780 Boyhton Col 2 10.11 9.00

	Dec. 1	6/12.
12/16/12.	To cartage on 25 bales hops to the	ie
	St. P. Ry	2.50

Merchants' Storage & Transfer Co., Milwaukee, Wis.

174	Pabst Brewing Company vs.	
S. Frit	z Nave, New York, 11/9/12:	
Nov. 9.	Fredericks Salary15.0	0
	Mrs. Harney's Salary	
	Fredericks expenses 2.3	
	Phlyer Slip #27 4.2	
	36.5	5
Proportio	on for the 5 days, Nov. 5 to Nov 9/1221.4	3
C. A. Phi		
Sprin	ngfield, Worcester, Providence, Nov. 12.	
Hotel and	d meals4.0	0
Car fare l	ocal phones etc	5
Phone to	Hartford from Providence	0
" Sp	oringfield Hartford,	5
66	" Worcester	5
Fare Spr	ingfield to Worcester	5
" W	orcester Providence	0
		_
[148]	7.8	0
S. Frit	z Nave, Nov. 27/12.	
Nov. 25.	Exchange & Dft	0
	do 9	0
27.	Stamps	0
	Ticket N. Y. to New Haven 1.5	5
	Seat " 1.0	0
	Ticket New Haven to Boston 3.2	5
	" Seat 1.0	0
	Boston to New York 4.7	5
	Seat 1.0	0
	Meals 6.6	0

E. Clemens Horst Company.	175
Entertaining (Machine)	8.00
Hotel bills	
Taxi, tips, bag boy, porters, card	are
Phone calls, telegrams	7.40
D 1 D'II T 0/19	50.85
December Bills. Jan. 8/13.	4 00
Dempsey & Carroll	
Elbe File & Binding Co	
Foster-Scott Ice Co	
Fifth Avenue Building Steno Office	
New York Telephone Co	51.72
Patterson Press	24.60
Tower Bros. Stationery Co	22.35
United S. Realty & Imp. Co	50.00
Underwood & Underwood	
Western Union Tel. Co	
Postal Tel. Cable Co	
	276.88
Off for S. F. Nave personal Tel	
On for S. F. Nave personal Tel	
	383.67
Less B. C. Hopp Co	8.29
	$\frac{-}{274.78}$
S. Fritz Nave, N. Y., Feb. 6th, 1913.	_,,,,,
Feb. 6. Stamps	10.00
" 6. Salary to Feb. 8	
" 6 Miss Weisell to 8th	

176 Pabst Brewing Company vs.	
6. Fredericks expenses	1.60
" 6. Sheridan sampling	
1 0	
	46.90
Mch. Bills, Apr. 12, 13.	
Am. Dist. Tel. Co	1.00
Foster & Scott Ice Co	2.60
John J. Finn	20.05
5th Ave. Steno Office	18.38
Thomas S. Masterson	19.38
N. Y. Telephone Co	49.75
Patterson Press	15.00
Postal Tel. Co	1.15
Tower Bros. Stationery Co	16.25
Tower Mfg. & Novelty Co. fountain pen	2.50
U. S. Realty & Impt. Co	80.00
D. P. Winne Co	3.68
W. U. Tel. Co	33.69
Economy Clean Towel Co	1.00
	\$264.41
Charged as \$263.98. [149]	
$\overline{\text{M}}$ ay 10/13. Charged as	\$209.50
Itemized as follows:	
1—April Bills:	
N. Y. Telephone Co	23.10
Dempsey & Carroll	1.00
Foster Scott Ice Co	
J. J. Finn	
U. S. Realty & Imp. Co	
Empire Furn. Co	11.40

E. Clemens Horst Company.	177
Fidelity Whs. Co	25.24
5th Avenue Building Steno	15.65
Patterson Press	14.25
Tower Bros. Stationery Co	3.46
W. U. Tel. Co.	14.15
Postal Tel. Co	2.27
_	
	228.32
May 10.	
May Bills:	
H. W. Dubois Carbon paper	1.50
Foster-Scott Ice Co	3.25
John J. Finn trucking	5.41
5th Ave. Bldg. Steno	8.45
Fidelity Whs. Co	22.64
N. Y. Tel. Co	33.50
Patterson Press Printing	17.95
Tower Bros. Sta. Co	2.75
U. S. Realty & Imp. Co. rent	100.00
Postal Tel. Co	1.34
W. U. Tel. Co	11.50
do	1.15
_	
	209.50
As a sample of the vouchers attached to t	the Chi-
cago Office Expenses are the following:	
Irving G. Markwart,	
Chicago, April 15, 1903.	
Telegram sent	\$ .50

178	Pabst Brewing Company vs.	
Fare	from Joliet to Chicago	74
	are to Chicago	
		2.23
Т (	d. Markwart, April 19, 1913.	4.25
	are	50
	G. George, April 17, 1913.	00
	are	50
[150]		
I. (	G. Markwart, Chicago, Ill., May 6th, 1	913.
Car f	are	\$ .40
Telep	hone	15
Spen	t cigars	25
		\$ .80
	d. Markwart, Chicago, May 13, 1913.	
	are	
Stend	ographer's salary	12.50
		12.80
Т (	G. Markwart, June 30, 1913.	12.00
	t for Mr. Horst	70
	are	
		1.10
Ι. (	G. Markwart, Credits.	
Nov.	30. Salary	. 100.00
Dec.	31	. 125.00
Feb.	21	. 125.00
Mar.	31	. 250.00
Anr	30 Salary	125 00

E. Clemens Horst Company.	179
(Testimony of F. G. Ernest Lange.)	
Mar. 31	. 125.00
June 30	
	\$975.00
Among the Eastern Miscellaneous expe	nses are
the following:	
Merchants' Storage & Transfer & Storage	ge Co.,
Milwaukee, Wis., Oct. 12th	
100 bales of hops at 8¢ per bale, lot 461	\$ 8.00
To weighing charges on same at 5¢ per bale	
	13.00
Same Company, Oct 12th, 1912.	
Lot 462. 100 bales at 8¢ per bale	. 8.00
Thomas S. Masterson, March 31st, 1913.	
Feb. 25th. 50 bales 524 Red Star Line	3.00
New York, March 1st, 1913.	
50 bales 524 Hoboken	3.00
	¢6 00

\$6.00

## [151]

A. I figured the overhead to be \$4,459.30. Leaving out the overhead altogether and figuring commission at 6%, it would be \$6,000 and the difference would be \$1540.70. If we had charged a commission of 1½¢ instead of an overhead charge the total loss on 400,000 pounds would be \$34,192.43. If I had figured the commission at 1½¢ a pound and taken 190 pounds to the bale, the commission would amount to \$5,700, or \$1240.70 more than the overhead charge, and the total loss estimated at 1½¢ on

an average bale of 190 pounds would be \$33,892.43. There is no such thing as selling hops at auction in the open market. A 2000-bale order if a large sale. Hops are generally covered by contracts prior to November of each year.

Cross-examination by Mr. POWERS.

The 3062 bales of Cosumnes hops were on hand in November, 1912; some were on the Cosumnes ranch, some were in Chicago, some at New York, some were en route east and some at Milwaukee. In Milwaukee they were at the Merchants Storage & Transfer Company's warehouse. In New York they were at the North River warehouse and the Terminal warehouse. Generally hops of that sort were sent to the order of E. Clemens Horst Company, or notify E. Clement Horst Company. Those in Chicago were at Sibley's warehouse. I will not be able to give you the amounts until this afternoon.

Q. What designation, if any, was made on any of these hops after November 4th, to indicate that they were Pabst goods?

Mr. DEVLIN.—I object to that as entirely immaterial and irrelevant.

The COURT.—Objections sustained. They were not called upon to designate them as Pabst hops after November 4th.

Mr. POWERS.—Exception.

#### Exception #49.

Q. Was there any act done by the Horst Company so as to segregate 2000 of the 3000 bales after November 4th, so that any person other [152] than

the Horst people themselves could determine which of the 3000 bales were to be considered as Pabst goods, and sold on the Pabst account?

Mr. DEVLIN.—That is objected to as immaterial and irrelevant.

The COURT.—Well, it is immaterial and irrelevant both if there is no question about the renunciation of this contract by Pabst on November 4th, but of course, I cannot now anticipate evidence which may be introduced to refute that fact. It is wholly irrelevant and immaterial so far as the Pabst people were concerned as to whether these hops were marked, and whether they were set aside, after the repudiation of that contract, because a contract repudiated before delivery is made is just as effective as far as the plaintiff is concerned as one that was repudiated after the time for delivery has arrived. If it is an absolute repudiation of the contract, they need not go through the idle ceremony, of setting aside the goods to be delivered to a person that has refused to receive them.

Mr. DEVLIN.—I will ask Counsel at this time if he claims or if he does not admit that Pabst and Company cancelled the contract, so far as they could cancel it, and repudiated it November 4th, 1912.

Mr. POWERS.—No question about that.

The COURT.—That being the admission, then the objection is sustained.

Mr. POWERS.—Exception.

## Exception #50.

Q. How yere you able to determine in your com-

putation what portion of the expenses were incurred upon goods which were being sold on the Pabst account?

- A. Why I knew the number of bales of hops that were sold by the eastern officers of the two thousand bales.
  - Q. Which 2000 bales?
- A. The 2000 bales that he has of Cosumnes hops that Pabst had refused [153] to take.
  - Q. What 2000 bales were they?
- A. I believe Mr. Horst already gave that to you. We have a list of the sales showing the 2000 bales.

The COURT.—(To Witness.) You do not catch Counsel's meaning. He is still reverting back to his claim that it was necessary to set aside the 2000 bales appropriated for the purpose of filling that contract. Instead of just simply taking 2000 bales out of the entire amount, you had to sell them as the hops that had been contracted for by Pabst, and his claim is that you should have set apart a certain 2000 bales of hops to fill that contract with. That is what his questions are directed to.

Mr. POWERS.—When you made up the price for which certain goods sold, how did you determine what portion of the 2000 bales should be used to fill that order?

A. Well, these are all the sales of Cosumnes hops since November 4th, 1912, that are included in this list. There were 1346 sold by the eastern office, and 494 bales by filling contracts already in existence.

The remaining 1062 bales were also delivered on previous sales.

- Q. Were the 1062 bales sold at higher prices than those which they had segregated to us?
  - A. No about the same price.
- Q. Give us the prices that were obtained for the 1062 bales. Kindly compute it and let us have it after the recess.
- Q. What other goods were being sold by the New York office at that time besides these 3062 bales of Cosumnes hops?
- A. A total of 2536 bales. There were all kinds of hops, Cosumnes hops and different kinds of hops of the United States crops.
- Q. What potion of them was sold during the month of November, 1912?
  - A. I have not a tabulation of that. [154]
  - Q. Can you give it to us?
  - A. I can give it to you.
- Q. How many Cosumnes goods remained unsold in June 1913? A. 16 Bales.
  - Q. How many on May first?
  - A. Thirty-four bales.
- Q. How many goods other than Cosumnes goods remained unsold June 1st.
  - A. I cannot tell you.
- Q. How were you able to get the percentage of expenses properly incurred during the month of June, if you do not know the number of bales on which you computed it?
  - A. We had the total number sold during the period

from November 4th to June 30th of Cosumnes hops and other hops.

Q. Was it necessary to maintain an office in New York with a manager's salary at the sum of \$500.00 a month in order to sell 16 bales of Cosumnes hops?

Mr. DEVLIN.—I object to that as irrelevant, incompetent and immaterial and argumentative.

The COURT.—I think so. He has not made any statement which makes the assumption a proper one.

Mr. POWERS.—Exception.

#### Exception #51.

- Q. What were the expenses of the New York office for salaries while those 16 bales were on hand to be sold? A. Which sixteen bales.
  - Q. Those on hand June 1st.

Mr. DEVLIN.—I think that is absolutely immaterial.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

#### Exception #52.

#### [155]

- Q. What were the expenses of running the New York office during the month of June, 1913?
- A. That is down here. I will have to get it out and figure it for you.
  - Q. Give us the items of it.
  - A. I believe you said the New York office.
  - Q. What did that consist of?
- A. I have not the voucher before me and I cannot say.
  - Q. What is the next item?

- A. Thirty-seven dollars and fifty-five cents.
- Q. What is the next item? A. \$1.60.
- Q. What were the salaries during that time?
- A. I cannot say without the voucher.
- Q. Was there a salary of \$500.00 a month paid to the salesman at that time? A. There was not.
- Q. What was the salary of the manager of the New York office?
- A. For a certain portion of the time it was \$350.00 a month, then \$500.00 a month, and then \$125.00 a month.
- Q. Was it necessary to have a five hundred dollar a month man there in order to sell 2000 bales of Cosumnes hops?
- A. I did not hire the man, but the man was an expert salesman, or considered as an expert salesman and that was the salary given him.

The COURT.—What was the occasion for a difference in the salary of \$350.00 a month a part of the time and \$500.00 later on. Was it owing to the condition of the market or what?

- A. No, sir, his salary was increased at that time. After he had been with us for some time, at a certain time his salary was increased. At the end of March 1913, that man left us, that is, he left the New York office and went over to our London office, and since there was another man in charge at a salary of \$125.00 a month. [156]
- Q. Was the man that you paid a five hundred dollar salary to under a contract which was binding on November 4th? A. Yes, an oral contract.

Q. And that period has not expired?

A. No, sir. I would not say that there was a contract as to the length of time, but there was an agreement as to his salary. I do not know whether there was a stated salary. The salary of \$500.00 continued about three of the months after November, 1912; January, February and March, 1913, the salary was \$500.00. In November and December he got \$350.00. I do not know why the salary was raised. The number of bales of Cosumnes hops on hand December, 1912, was 1246. I do not know where Pabst goods were at that time.

Q. Can you find out for us? A. Yes.

The COURT.—What is the materialty of this?

Mr. POWERS.—There are certain freight charges that are made on these goods. Our understanding is that they were shipped from one place to another. I want to check them over.

Mr. DEVLIN.—What is the total of those freight charges on these trips?

A. There was the freight to the east to the original point, and there was the freight transferring from one warehouse in one state to a warehouse in another state. That is the local freight.

Q. On January 1st, 1913, how many Pabst goods were on hand unsold?

The COURT.—I regard this as very immaterial, unless you show me that it is material.

Mr. POWERS.—They raised the salary of the New York man when the amount of goods was less to be sold, and it shows that there was no connection

whatsoever between the amount of Pabst goods to be sold and the expenses. [157]

The COURT.—That does not make any difference. A man transacts his business in a certain way. There comes a time when he feels that an employee's services are worth an increase in salary. Now the particular condition of the business with reference to any one transaction is wholly immaterial. It is immaterial as relating to a particular transaction except in so far as it may properly be charged to the proportional amount of the entire expenses of that transaction. I cannot permit you to go into this in such minute detail.

Mr. POWERS.—Exception.

#### Exception #53.

A. The salary of the manager of the Chicago office was \$350.00 and he had an assistant whose salary from November to July was \$975.00. The salary of the assistant in the New York office in June, 1913, was \$125.00 and we continued to employ him after the Pabst goods were sold. Mr. Slager was either selling or endeavoring to sell hops. I did not see any of the services performed. The next item is \$15.00 for secretary's salary.

Q. What services, if any, did the stenographer perform with reference to the Pabst goods if you know of your own knowledge?

A. You are segregating an item according to the Pabst goods when all of the services were rendered for all of the goods that were sold at that time.

Mr. POWERS.—I move the answer be stricken

(Testimony of F. G. Ernest Lange.) out as not responsive to the question.

The COURT.—Motion denied.

Exception.

#### Exception #54.

Q. You do not know what services he performed, if any with reference to the sale of the Pabst goods at that time?

Mr. COURT.—It would not make a particle of difference. [158]

Mr. POWERS.—I want to get at a few of these items. With reference to the various items that go to make up the \$37.50, for instance, exchange, December 31st, seventy-five; stamps for office, \$4.00. You have no means of knowing what those stamps were used for, or what that exchange was for, of your own knowledge?

A. As far as I am concerned, I was not there watching the stamps go out, but I can say what the stamps were probably used for.

Q. You do not know of your own knowledge?

A. They must have been used to pay the postage on letters. Other than that I do not know.

The COURT.—They may have rolled them up and made cigars out of them?

A. I do not know. That is the regular office expense.

Q. What connection those expenses had to the 2000 bales, or the 16 bales that were left on hand at that time you do not know anything about?

A. We did not apply them to any particular hops.

A. You yourself do not know about what those

(Testimony of F. G. Ernest Lange.) expenses were for?

The COURT.—Of your own knowledge?

- A. I know what they were for. This is a part of the expense of running the New York office.
- Q. Of your own knowledge you do not know what they were for, the expense of the stamps?

A. I do not know.

The COURT.—I presume you are asking these questions for the purpose of moving to strike this out on the ground that he is testifying to hearsay?

Mr. POWERS.—Yes.

The COURT.—The motion is denied.

- Q. Your answer would be the same as far as all of the other items are concerned of the New York office, would it not? [159]
- A. In reference to my knowledge of them. I know nothing about them other than these are expenses for running the New York offices. These are the expenses we paid to our men, and they came to us and we entered them in our books.
- Q. But whether any portion of those expenses were applied towards the sale of the Pabst goods, or directed towards the sale of other goods, you do not know?
- A. They were directed against the sale of the Pabst goods and other goods, whatever hops we had to sell at that time.
- Q. Do you personally know what was done with reference to whether there was any segregation or not of any portion of those expenses for these particular Pabst goods or not?

There are certain traveling expenses of trips taken in those vouchers, are there not?

- A. Yes, there are. Here is one for \$11.20 for hotel bill, meals, fare, car fare, public stenographer and berth for Mr. Fleger from Boston, Mass., to Providence, Rhode Island, and New York City.
- Q. You do not know what services were performed during that trip by Mr. Fleger?
  - A. No, sir, I was not with him.
- Q. You do not know in what manner, if at all, his services were connected with the Pabst goods?
- A. Mr. Fleger is one of our salesmen and was endeavoring to sell hops. During the entire period that he was with us he was trying to sell hops. The Pabst hops were a part of the hops that we were trying to sell.
- Q. You do not know of your own personal knowledge whether Mr. Fleger went on that trip, and whether it was taken in connection with Pabst goods or not?
- A. No, he may have gone fishing for all I know. [160]
- Q. All you know about it is that it was entered in your books as a part of the expense of selling hops?
  - A. That is all I know about it.

The COURT.—All of your testimony with reference to these transactions during that period, regarding expenses of these eastern offices, is being given simply as a result of your examination of the books?

A. Entirely.

Mr. POWERS.—I move to strike out all of the testimony of the witness as to overhead expenses on

the ground that the evidence on which it is based is hearsay.

The COURT.—The motion is denied.

Mr. POWERS.—Exception.

#### Exception #55.

- Q. Will you turn to some of those vouchers, and give us one or two more of the items so that we will know the character of the items that are included in this. I show you an item dated November 12th, 1912. What does that refer to?
  - A. Expenses of I. G. Markwart to Chicago.
  - Q. What does that include?
  - A. Stamps for samples, car fare and printing bill.
- Q. How do you know that printing bill was for stationery that was used after June or not, after June 1913? A. I do not know.

Mr. DEVLIN.—How much does that amount to? Mr. POWERS.—\$18.

Mr. DEVLIN.—Well, take the \$18 off of the 4000 right now.

Mr. POWERS.—I show you now under another item under date of December 24th. What does that refer to?

- A. A. J. George, Expense slip No. 9 from Chicago, For Christmas presents \$13.50. [161]
- Q. Have you any means of knowing whether those Christmas presents were to people who were trying to sell Pabst goods or not?
- A. No, one of them, the largest item, was for the office stenographer.
  - Q. Do you know whether that was paid for the

purpose of attempting to get the office stenographer to do better for the general welfare of the business, or whether it was done for the Pabst goods?

- A. It was paid her in the general and ordinary run of business. Another item is I. G. Markwart, from Green Bay, Wisconsin, December 25th and 26th, 1912, includes car fare and telephoning. This last is generally samples of the expenses.
- Q. What was the gross amount of the business done in the Chicago and New York offices from November 4th, 1912, to July 1st, 1913?
  - A. 3,882 bales of hops.
- Q. How much of the expense incurred was incurred for the purpose of maintaining that establishment and having it ready to do business the following year? A. I do not know.
- Q. How much of it was incurred to finish up business that had been inaugurated prior to November 4th, 1912? A. I could not say.
- Q. How much of it was incurred because of contracts that were in existence on November 4th, 1912, and had to be carried out because of the existence of those contracts?
- A. I do not know that there was any. The New York offices are rented and it is necessary to maintain an office prior to November 4th, 1912, and thereafter.
- Q. It is a costly matter to assemble an office force, is it not?
- Mr. DEVLIN.—This is objected to as hypothetical, vague, indefinite and uncertain.

Mr. POWERS.—To show that a portion of this expense was for the purpose of preventing the office force from being disseminated and thereafter got together, and that there has been no allowance for [162] that purpose. I am showing that the method of computation is wrong. I am trying to do that if I can. A portion of this expense should be charged generally to up-keep, and not to these two lots of hops that were on hand at the time is my theory.

This witness has testified that there was a certain number of hops on hand. He has divided the hops into two lots. The Pabst lot and those which were not the Pabst lot. He has proportionated the expense of the selling of those two lots among two offices without taking into consideration the fact that a part of that expense was due to the general upkeeps of the business. I am trying to show that is not a very fair way of proportioning that expense, because a certain portion of it was necessary for the holding of the office together, keeping it from being separated, and then having to pull it together again for next year's business.

The COURT.—I do not think that it tenable.

Mr POWERS.—Exception.

## Exception #56.

Q. Was there not a large amount of expense made at that time for the purpose of keeping together the office force and holding the offices which you had at that time?

A. Well, no. These expenses are regular office expenses. They are expenses incurred in selling hops.

- Q. If there had been no Pabst to be sold by Horst, what would have been the expense of the New York office?
- A. I could not say. If I remember corectly we did not have an office in New York every year. I believe we had one in 1911. I could not say whether we had one in 1910. We kept the office after July 1913, and all the Pabst goods were sold. I could not say whether the same stenographer remained there and the same clerk because I have not examined the records. [163]
- Q. Will you give me the amount of the general expenses for the office for the month of July, 1913, and then we can see how they differed from the month of June.

The COURT.—I do not think it will be material if it were here, to tell you the truth, Mr. Powers.

Mr. POWERS.—I will take your Honor's ruling on it.

The COURT.—If you are going to get it here, then I will rule on it. I do not believe it would be material.

- A. I would have to go to San Francisco, and it would take possibly a couple of days to get it.
- Q. Have you got the report of the warehouse holdings during the month of November, December, January, etc. to July, so far as they effect the Pabst goods? A. I have not that.
  - Q. When can we have that?
  - A. I believe I can get it for you to-night.
  - Q. There were a certain three bales that were sold

to Mr. W. P. Downey, Montreal, Quebec. Do you know where they came from?

A. From New York. I believe the North River warehouse, or the Terminal warehouse, New York.

Q. Where did the goods come from prior to going to that warehouse? A. The Cosumnes Ranch.

Q. When did they get to that warehouse?

A. I have not got the record here.

Q. Were they submitted to anybody else prior to being submitted to Mr. Downey?

A. I could not say off hand, but I am quite sure they were not.

Q. Were they a portion of the goods from which the samples 1 to 20 came?

A. I do not know whether the samples came from those particular bales, they are the same grade, and same particular bales. I believe [164] the fifty bales sent to the Stiel Brewing Company were in one of the New York warehouses, either the North River warehouse or the Terminal warehouse. I cannot tell you when they left the warehouse.

Q. We want to know which of these goods have been rejected, and whether or not the Pabst people were given goods that had been rejected, and the 1000 bales that were not given to Pabst were goods that had been rejected. I want to know the history of each of the bales you designate as Pabst goods. For that reason I will want to know where they were stored. I move that all of the evidence of the witness with reference to overhead charges be stricken out on the ground that it is dependent upon items

that are not shown to be in any manner connected with the Pabst Brewing Company's goods, or the goods that Horst set aside for the Pabst Brewing Company, or designated to fill the order of the Pabst Brewing Company, and that it is based upon hearsay evidence of expenses by the other parties, and is immaterial and irrelevant, also a conclusion of the witness as to the particular amount to be charged, based upon matters that lie partly in law and partly in facts, and also calling for the opinion of the witness.

The COURT.—The motion is denied.

Mr. POWERS.—Exception.

#### Exception #57.

There were two lots 523 and 524 in the Sibley warehouse. They were designated as Pabst goods by the Horst people.

- Q. When were they made the basis of any charge against the Pabst account?
- A. When we made up our list of sales on the 2000 bales. Just since we have been getting up the statements of the account you have asked for. [165]
- Q. What other Horst Cosumnes goods were then in the Sibley warehouse in the year 1912?
  - A. 100 bales, Lot 517.
  - Q. When did you put them in there?
  - A. December 16th, 1912.
- Q. You cannot, then, give us from your original records where the 2000 bales, or the 1346 bales that were set aside,—that were sold for the Pabst Brewing Company account were stored on November 4th, 1912?

A. I do not have it here. That is in several books and it would take some time to point that out to you, but I can do so.

Mr. POWERS.—That is the principal thing I have been asking for for three days.

The COURT.—You want to be able to verify the fact that they were all Cosumnes hops?

Mr. POWERS.—Yes. And our information is that some of these had been rejected, taken back and sold to different people. We want to be able to find out whether the 2000 bales that were set aside by Horst were rejected goods or not. We want to follow the goods from their origin to their place of departure. I want that so that I can continue my cross-examination of Mr. Horst at as early a date as possible.

Q. Will you give me the figures from which you get that overhead charge?

The COURT.—You cannot spend that indefinite time on items like that. I think you have exhausted the subject.

Mr. POWERS.—I want the figures that produce 4400 odd dollars so that I may check them off.

A. October, New York and Chicago expenses were \$12,862.17. During that time there were 1346 of Cosumnes hops; 2,536 bales of other hops, making a total of #,882 bales, at an average selling price of \$3.31 3/10 per bale, or a total selling cost of the 1346 bales, proportionately [166] \$4,459.30.

Q. I have not asked about this 2536 bales that forms the other factor. I want know how to check

(Testimony of F. G. Ernest Lange.)
up the accuracy of that amount. Where did you get
that 2536 bales? A. The sales book.

- Q. Is that sales book available to be examined?
- A. No, sir, it is not here. This is the book I was speaking about this morning.

Mr. DEVLIN.—We will get it for you as long as you want it.

- Q. How many bales did he have at the beginning of the season approximately? A. I could not say.
  - Q. More than 10,000? A. I do not think so.
- Q. And the expense of the office ran on just the same?
- A. Yes, but the salesmen, who caused the largest expense left in March.
- Q. What was the other item you testified to as making up the expense to be charged to the Pabst goods?
- A. \$177.25 insurance. Coast storage, \$153.50. Freight on tare, \$188.43. Interest \$1185.63. Eastern miscellaneous charges, \$549.63. Brewer's discounts and losses on bad accounts, \$294.55. Losses on bad accounts, uncollected accounts, \$1896.70. Interest on those same uncollected accounts \$169.79. Loss on 2000 bales between the price sold to Pabst and the price at which we sold them to other parties,—in other words, the price realized, \$23,584.80, making a total of \$32,651.73, plus several items which I have not charged for.
- Q. Now, with reference to brewer's discounts in the amount of \$294,55, what are the items of that?
  - A. There were two invoices. 1% discount to the

Eagle Brewing Company at Utica, New York, and a 1% discount—the price per pound [167] was 17½ cents. Delivered at Utica, New York, and the freight was \$2.25 for 100 pounds. I believe they were shipped from New York, in November, 1912. I cannot give you the date. The other item was one per cent discount to the Gulf Brewing Company at Utica, New York. Bad debts \$32.56, uncollectible claims, the Menasha Company, invoice amounted to \$33.33. We collected \$21.90. Our loss was \$11.43. The Stroudsberg Brewing Company's invoice amounted to \$358.25. We collected \$107.40, and our loss is \$250.76.

- Q. Were those two lots of goods segregated as Pabst goods before the loss or after the loss?
- A. They were Cosumnes hops delivered after November 4th, 1912. They were of the three thousand bales on hand at that time.
- Q. And lots could have either been out of the 1000 bales that was not designated as Pabst's or the 2000 bales designated as Pabst's?
- A. No, because this is a sale made after November 4th, 1912. All our sales after November 4th, 1912, of Cosumnes hops were Pabst goods. They were the same class of hops, the samples of the same hops, the same grade, everything.
- Q. Until you commenced to prepare for this lawsuit, you did not set aside any goods as Pabst's goods, did you?
- A. On November 4th, 1912, we had more than 2000 bales on hand. After November 4th, we deliv-

ered those hops to different people. Some of them we had losses on. There were two unpaid accounts. There were four parties we had losses on. I have a list here of every sale made by the plaintiff from November 5th, 1912, until the end of the season, of the Cosumnes sales, and they are marked on that list, and all of the Cosumnes sales after November 4th, 1912, that is, from November 5th on, are included in that 2000 bales of Pabst hops.

Q. Where are the sales of those 1000 bales? [168]

A. Those were previous deliveries.

The COURT.—He has mentioned that several times that they had contracts outstanding, and had to fill them.

A. Those were previous deliveries.

Mr. POWERS.—I want to check over from the entries in the books what the witness has testified to. Where is the record of the 1,000 sales?

A. In our sales book. The insurance on 1503 bales was the average time of 79 days; on 497 an average time of 41 days; that average time is the time between November 4th and the date of delivery. In other words, we had the 1503 bales 79 days and the 497 bales an average of 41 days.

Q. How is the storage figured?

A. It is figured from November 4th, until the day the hops were shipped from our warehouse on the ranch. For the time they were there, we charged the storage rate of 10¢ per month, and the amount of that storage is \$153.50.

The witness gave counsel a copy of the list as follows:

St	torage.	Carehouse of E	. Clemens Hors	Coast.
	111 1	varenouse of 12	. Ciemens Hors	Storage @ 10¢ Mo.
Lot.	Bales.	Shipped.	Months.	Amt. Storage.
		1912.	1912.	
523	100	Nov. 13	1	\$10.00
25.4	100	66 66	1	10.00
472) 476)	116	6.5	1	11.60
473	100	" 14	1	10.00
516	100		1	10.00
519	5	" 11	ī	.50
4.5.4	22	" 12	1	2.50
470	100	" 15	1	10.00
519	33	19	1	3.30
522	42	66	1	4.20
517	100	" 16	1	10.00
		1913.		
525	13	May 13	7	9.10
526	18	66 66	7	12.60
Var. t	o L. D.	Mar. 12	5	32.50
Jacks	65			
476	5	" 21	5	2.50
471	50	Feb. 4	3	15.00
	Т	otal Coast Stor	age	

Total Coast Storage.....\$153.50

[169]

#### Q. What became of Lot 523?

A. Three bales went to a claim against the railroad. The hops were damaged on the way, damaged some way or other. We delivered them to the railroad company and made a claim out for them. 91 bales went to Cleveland and Sandusky Brewing Company, at Cleveland, Ohio.

- Q. What was the price they were sold for?
- $\Lambda$ .  $16\frac{1}{2}$  cents delivered in Cleveland.
- Q. What became of this claim on the 3 bales—what became of that claim?

The COURT.—Tell me the materiality of that?

Mr. POWERS.—Apparently they were sold to the railroad company, and a charge is made here for

their storage. Apparently those goods were sold to the railroad and do not appear to be put back here.

- A. They were in the warehouse and we charged storage on them.
- Q. You made some claim against the railroad company for damages on them?

A. Yes. I believe the claim for damages to those hops was paid. I have no credit for it here. I will have to examine the books to find out. These three bales were included in the coast storage. The miscellaneous charges cover these hops and other hops. Other lot numbers are marked on them. I have crossed with a blue pencil the Cosumnes hops on which they are charged. All this other has been kept out. Now as to the uncollectible accounts there were two bills to the Park Brewing Company. One amounting to \$162.63, and the other \$426.67; and one to the Eastern Brewing Company for \$1307.40, are unpaid accounts. [170]

### Reference to Storage.

The storage on Pacific Coast was 969 bales of hops.

- Q. Where are the other 600 bales of hops?
- A. They were en route to the east and were at Milwaukee, Chicago and New York.
- Q. Now, if the Pabst goods were to be delivered from Milwaukee, why were any of the goods that were available shipped to Pabst from New York?
  - A. I do not know.
- Q. You did not have 1500 bales on hand in California to ship to the Pabst Company on Nevember 4th, 1912?
- A. No, sir. Lot 524 were stored in our Cosumnes ranch. It was stored in our warehouse on the ranch.

Q. When did the other bales of that year's crop leave the warehouse?

A. Between the time they were harvested and November 4th.

Mr. DEVLIN.—I offer these calculations, as to interest, storage, freight on tare, insurance, local freight, in evidence.

The said calculations were as follows: [171] INSURANCE.

On	Cosumnes	Hops from No	v. 4/12 to Date	e of Delivery	to Buyer.
Bales.	Day	s. Bales.	Days.	Bales.	Days.
3	11	1 4	50	10	230
50	18	3 20	103	5	228
5	17	7 6	88	8	230
98	52	2 10	131	5	243
1	(	3	72	3	253
100	34	97	82	50	92
25	11	. 85	93	1503 A	vge. days 79
3	11	1 33	72		0
1	12	6	72		
25	22	91	73		
5	17	7 2	77		
10	21	1	96		
10	21	. 1	103		
1	16		87		
15	17		107		
10	19		104		
5	17	8	103		
50	41	50	114		
20	18	25	109		
10	41	65	116		
1	238	3 15	126		
25	4(	35	131		
5	56	3 2	140		
6	6.5	5 25	161		
1	46	3 10	136		
1	174	2	126		
2	225	5 5	131		
1	116	1	136		
20	54	6	146		
15	49	1	159		
2	41	38	165		
92	77		179		
44	47	3	189		

1503 Bales @ 37.20 per bale=\$55,912 @ \$1.25 per \$100.00 P/A for 79 days= Insurance \$151.27.

Bales.	Days.
75	91
116	19
80	112
20	56
15	33
100	1
91	7

<sup>497</sup> Avge. days 41.

## FREIGHT ON TARE. (Tare=5 lbs. per bale)

	Lbs.	Frt. Rate.	
Bales.	Tare.	Per 100#.	Amount.
859	4295	\$1.75	\$75.16
3	15	2.30	.35
61	305	2.09	6.37
20	100	1.89	1.89
137	685	1.94	13.29
101	505	1.93	9.75
25	125	1.97	2.46
30	150	2.14	3.21
10	50	2.55	1.28
51	255	1.95	4.97
10	50	2.04	1.02
1	5	2.80	.14
11	55	2.05	1.13
12	60	2.11	1.27
20	100	2.19	2.19
20	100	2.23	2.23
92	460	2.38	10.95
4	20	2.06	.41
20	100	2.65	2.65
6	30	4.70	1.41
110	550	2.03	11.17
11	55	2.28	1.25
97	485	2.21	10.72
85	425	1.90	8.08
2	10	2.15	.22
21	105	2.25	2.36
1	5	2.01	.10
27	135	2.20	2.97
5	25	.20	.05
13	65	2.10	1.37
5	25	2.02	.51
50	250	3.00	7.50
1920			\$188.43
[173]			

<sup>497</sup> Bales @ \$37.20 per bale=\$18,500.00 @ \$1.25 P/A for 41 days=Insurance \$25.98.
[172]

INTEREST.

#### IN DELIVERIES OF COSUMNES HOPS From Nov. 4, 1912 to Date Mentioned Below.

	,			Int. @ 6%	
Name.	Amount.		Date Paid. 1912.	From Nov. 4/12.	Days.
W. P. Downey	\$ 92.86		Dec. 31	\$ .88	57
Steil Brg. Co.	1314.61		Dec. 11	8.15	37
Park Brg. Co.	162.63		Unpaid		
44	426.67		4.6		
			1913.		
Springfield	2374.40		Jan. 9	26.12	66
F. W. G. & Co.	30.00		Jan. 15	.36	72
Narragansett	3020.56		Jan. 10	33.83	67
Rothaker	742.02		Mar. 24	17.29	140
Gutsch	91.80		Nov. 30	.39	26
Pulkrabek	30.15		Jan. 31	. 59	118
Haffen	678.75		Dec. 9	3.94	35
Medina	164.38		Dec. 23	1.35	49
Geo. Cooke	308.38		Jan. 27	4.32	84
Florida Brg. Co.	306.39		Dec. 31	2.91	57
F. W. G. & Co.	295.84		Dec. 31	2.81	57
Sandkuhler	32.64		Nov. 30	.14	26
F. W. McGowan	158.73		Nov. 27	.60	23
Boston Beer	1420.03		Feb. 28	27.41	116
Eastern Brg.	1307.40		Unpaid		
Kuhlmann	299.83	\$99.73	Apr. 16	2.70	163
		200.10	June 17	7.50	225
Bruyndonckx	30.00		July 1	1.19	238
F. W. G. & Co.	684.00		Dec. 23	5.61	49
Lauer Brg. Co.	130.24		Dec. 31	1.24	57
Centerville	175.23	\$85.00	Feb. 17	1.49	105
		90.23	July 26	3.96	264
Consumers	31.45		Jan. 25	.43	82
44	29.89		Mar. 11	.63	127
	31.57		May 7	.97	184
**	60.90		June 30	2.41	238
Henderson	493.55		Jan. 25	6.76	82
Medina	50.00		Apr. 14	1.34	161
+ 4	50.00		May 19	1.63	196
**	50.00		June 7	1.79	215
66	124.42		June 17	4.67	225
46	50.00		June 30	1.98	238
44	150.00		Aug. 26	7.37	295
			1912.		
F. W. G. & Co.	53.65		Dec. 21	.42	47
Haffner	2600.94		Jan. 28	36.93	85
Steiner .	1155.65		Jan. 6	12.13	63
Jefferson	120.48		Feb. 10	1.96	98
Mobile	531.53		June 10	19.29	218

				Int. @ 6%	
Name.	Amount.		Date Paid.	From Nov. 4/12.	Days.
Silverton	166.00		Mar. 14	3.60	130
Centlivre	311.84		Mar. 30	7.58	146
Frostburg	98.22		Apr. 14	2.63	161
Cleveland Sand.	2837.85		May 5	85.98	182
Aurora	2438.09		May 19	79.72	196
Steiner	997.76		Jan. 28	14.16	85
Atz	177.48		Jan. 25	2.43	82
Steiner	2585.40		Jan. 24	34.90	81
Staemele	63.82		Jan. 24	.86	81
Wenner	30.72		Feb. 18	.54	106
			1914.		
Menasha	21.90		Jan. 26	1.63	448
[174]					
			1913.		
Smith Capron	\$1257.00		Feb. 13	\$21.11	101
Cooke Brg. Co.	408.30		Mar. 11	8.66	127
Manhattan	1473.16		May 14	46.85	191
Frostburg	94.67		May 31	3.29	208
"	50.00		June 30	1.98	238
46	50.00		Aug. 8	2.30	277
44	42.43		Sept. 29	2.33	329
Camu & Fils	1483.85		Mar. 31	36.35	147
Smith Capron	690.45		Feb. 28	13.33	116
L. D. Jacks	1727.05		Apr. 22	48.70	169
Altoona	460.67		Mar. 29	11.15	145
Yale	1029.28		Apr. 14	27.62	161
Allegier	119.64		Apr. 9	3.11	155
Johnson	682.17		June 23	26.26	231
Cataract Co.	285.16		Apr. 25	8.20	172
Hopkins	49.40		Mar. 25	1.16	141
Bauer Schweitzer	123.62		Apr. 22	3.49	169
McHenry	28.90		Aug. 18	1.38	287
Centerville	75.00		Sep. 15	3.94	315
4.6	75.80		Sep. 25	4.10	325
Husting	34.93		Apr. 21	.99	168
Hupfels	937.04		May 31	32,52	208
Vogls Indep.	35.00		June 19	1.32	227
Atlas	71.95		July 26	3.17	264
Atlantic	259.23	(1914)	Feb. 16	20.25	469
Gamble	120.49	(1913)	June 30	4.77	238
Lykens Brg. Co.	212.76		Aug. 11	9.94	280
Stroudsburg	107.47	(1914)	Mar. 19	8.95	500
Yale	73.12	(1913)	Aug. 16	3.54	285
Sutherland	685.53	,	Feb. 10	11.17	98
44	690.87		Mar. 7	14.16	123
			1	\$875.61	

			Int. @ 6%	
Name.	Amount.	Date Paid.	From Nov. 4/12.	Days.
Cream City	2204.39	Mar. 11	46.73	127
Gottfried	1640.29	Mar. 31	40.18	147
**	1706.29	May 14	54.26	191
Cream City	2514.78	Apr. 30	74.19	177
Hohenadel	322.56	Feb. 28	6.23	116
**	276.81	Mar. 31	6.78	147
Krantz	417.00	June 3	14.64	211
Eagle	2243.04	Nov. 27	8.52	23
**	961.26	" 13	1.44	9
U. S. Brg. Co.	2860.00	Mar. 4	57.20	120
			\$310.17	

[175]

Mr. POWERS.—I will object to that as irrelevant, incompetent and immaterial, unless they are connected with the 2,000 bales of hops that were specially set aside as and for the Pabst shipment after some definite time, so that there will be some means of knowing that they were properly charged against Pabst.

The COURT.—Let them be admitted.

Mr. POWERS.—Exception.

Exception #58.

[Testimony of F. V. Flint, for Plaintiff.]
F. V. FLINT.

Direct Examination by Mr. DEVLIN.

I have examined samples 1 to 20 and 25 to 38 sufficient to enable me to testify. I am a hop grower and buyer of hops. I have been engaged in the buying of hops for 22 or 23 years. I do business under the name of Flood V. Flint & Company, dealing in all kinds of California hops, including Cosumnes, American River hops, Russian River hops, Tehama and Yuba County hops, and have become more or less acquainted with the market prices of hops as a part of my business. Have sold hops to merchants.

(Testimony of F. V. Flint.)

I am also a hop-grower on the Cosumnes River, 22 miles from here, and about 3 miles from Horst's ranch. I have about 1300 acres in the season of 1912, on which are grown hops called Cosumnes hops. I have then engaged in the raising of hops for about thirty years. My father was raising hops before me. I am familiar with the picking and curing of hops and the like. In the year 1912, Mr. Horst submitted certain samples purporting to be Cosumnes hops to me and I examined them, and I also examined samples of hops numbered 1 to 20 sent by the Horst Company to Pabst, and also samples 25 to 38 sent by plaintiff to defendant. The examination was made to ascertain the condition as to their being choice or not. I found them to be choice. [176]

It is very difficult to tell the condition of a hop two years after it has been picked. Because they lose their brightness and also lupulin, also in color and flavor and they become old. I should not consider it a fair test to determine the value of hops two years after the hops had been grown, by the examination of the samples at this day. I did not split them wide open, but I examined them. I examined them to see whether they were clean picked. As far as the trade usage is concerned I consider them cleanly picked.

Q. What do you understand by the word "choice" as used in the hop trade?

A. It is the best average quality. It must be a sound hop. There is a grade of hops known to the trade as fancy. It is seldom used. I placed my initials on some of the samples submitted to me in

(Testimony of F. V. Flint.)

1912. I would call them choice hops.

Q. What was your judgment in regard to the other samples that you examined, in regard to their quality?

A. I declared them choice. Beginning with the fall of 1912, there was a fall in the market. It was falling right along. There is no place where hops are sold by auction. They are sold by contract and personal solicitation. It is not ordinary or customary to sell by auction. Hops are sold either by paying commission or salary. You generally pay a commission of so much per pound, one cent, 11/2 cent, or two cents per pound. It would take some time in the condition of the market in 1912 to sell 2,000 bales of hops, because it was late in the season, and England would not take any more of our hops. It was difficult to sell a large quantity outside of the United States, and it would have been very hard to sell them. You would have to force them upon some one. Make him a bargain price, or something of that kind, in order to sell them. It would take a long time. [177]

If in November, 1912, 2,000 Cosumnes hops were given to me to sell I would try the markets in the principal cities of the United States. I would send forth circulars and send forth men. There is considerable difference between air-dried and kiln-dried hops. I do not know whether I could tell the difference or not. I might get stuck on it but there is a big difference. There are two different processes. The Russian River hops and the Cosumnes hops have about the same reputation. About one-half of the

(Testimony of F. V. Flint.) crop is sold in advance.

Cross-examination by Mr. POWERS.

I am a friend of Mr. Horst, and connected with him in business to the extent that I own stock on an enterprise that he does, that is all. We are in the same line of business. I do not do a great deal of business with him. I was selling hops in 1912.

- Q. In November, 1912, were choice hops in demand?
- A. No, not in demand. Occasionally, yes, you would get an order, you know, I do not sell much to brewers. I have not much of a brewery trade just at present. I sell to merchants, and they sell to the brewers.
- Q. Were not the merchants looking for choice Cosumnes hops at that time?
- A. There may have been an order. As a matter of fact I did not sell one bale during the month of November and the month of December. I sold some in October.
  - Q. Choice Cosumnes hops?
- A. I will refer you to my list. I just made a short memorandum. I cannot recollect whether they were choice or not. Yes, January 15th, I sold some hops—100 bales. I considered them choice.
- Q. Medium Cosumnes at times were a drug on the market, but choice Cosumnes were in demand?
  [178]
- A. Choice hops are always in demand. They always want choice hops.
  - Q. Was there a falling market at that time for

(Testimony of F. V. Flint.) choice Cosumnes hops?

A. There was a falling market for all classes of hops.

Q. Did you look at the samples that had blue string tied around them? A. Yes.

Q. Does not that tend to prevent your seeing the color?

A. I examined the samples by looking at the top and the bottom. We turned them up in this way at the corner. I looked at the edge and I looked at the top and I split them this way as far as I could look into them. That is the way I look at a sample when I am called upon to look at them. I look them all over as well as I can.

Q. Is that the usual form of a commercial sample?

A. No, I do not think so. It differs from usual commercial samples because it has a blue string around it and pasteboard on the bottom. You usually send a larger size to merchants so that they can cut them up and make other samples from them. This is the usual size of a sample that you send to a brewer; they are made in that size so that you can carry them in your pocket, or mail them. The fact that it has a blue string on it does not have any effect upon its color. If it was green it might. A blue bottom like that might help the sample and show it off a little better by giving it a little shine.

Q. Were these samples a very high-grade hop or just medium hops that you examined?

A. They were choice hops.

Q. Were they cleanly picked?

(Testimony of F. V. Flint.)

A. They were sufficiently cleanly picked and I called them choice.

Q. With reference to sample two years old which has been kept in cold storage, and not broken into and handled, would the general appearance of the berry so far as its soundness, regularity and [179] color was concerned, still be apparent?

A. While it is in cold storage, yes. Two years is a pretty long time. I do not know that I am capable of passing on that. It would take the brightness or shine away from them after two years. I do not—whether it would effect the uniformity of color.

Q. What is a choice hop?

A. It is a sound hop. That means that it is handled properly, picked properly, dried properly, cleanly picked and handled properly in every way. Good even color. It may be greenish, light green, or it may be yellow, or it may be a greenish yellow. These samples are a greenish yellow. In a large quantity of hops they would not be just one like the other. The samples would represent the lot. They must be fat in lupulin and must be taken care of just the right way, thoroughly dried and yet not slack dried. This must be determined by inspection and examination of the hop.

Q. If the entire crop of a district was mouldy, would there be any choice hops that particular year?

A. The best average hop.

Q. If there should be no hops up to that quality, there would be no choice hops then?

A. No, sir.

Mr. POWERS.—Choice, then, is a purely relative

(Testimony of F. V. Flint.)

term, is that it? A. Why, yes, I should say so.

Q. And if by chance the berries were not sound, then the best hops that were there would be considered choice hops? A. Yes.

The COURT.—You need not ask any more questions on that subject. You have exhausted it.

The commission is what you make it. You may agree upon any price. The highest priced man is the man you usually regard as the best man to sell hops. I have never made any contract for  $2\phi$  a [180] pound and pay the man's expenses. I could not say that such contracts have been made. That is about the usual price as I understand it. If you want to sell hops you make a contract with the highest priced man and you might pay 2 cents a pound and pay his expenses. The man that is well known among the brewery trade has a certain trade that he can control practically.

- Q. To whom have you ever paid  $2\phi$  a pound and expenses?
  - A. I cannot say, but I think it has been done.
  - Q. Isn't the usual price one cent a pound?
  - A. I cannot say that it is.
- Q. If the seller sells to dealer, isn't the commission from 1/4 to 1/2 cent a pound?
- A. As between dealers, it is less. It is  $\frac{1}{4}$  cent to the broker.

Redirect Examination by Mr. DEVLIN.

The market price for choice Cosumnes in the month of February, 1913, was about 14¢.

If it is known that a dealer has rejected a quantity of hops, it has a tendency to depress the hops.

# [Testimony of E. Clemens Horst, for Plaintiff (Recalled).]

E. CLEMENS HORST (recalled).

Direct Examination by Mr. DEVLIN.

These hops were grown on the Cosumnes River land leased by the plaintiff.

Mr. DEVLIN.—I show you a letter, Mr. Horst, dated September 12th, 1911, and I ask you if that is an office copy of a letter that you sent to the Pabst Company? A. Yes.

Mr. DEVLIN.—Counsel will admit that we gave the regular notice to produce this letter in court.

Mr. POWERS.—Yes. We have made an examination and have been unable to find it. [181]

I recognize this as a carbon copy of a letter addressed to Pabst Brewing Company. I know that a letter was written. It is a reply to a previous letter which has already been introduced in evidence. It is the custom of our office to keep copies of all letters we send and a postage record. I have a book here that shows the postage stamp record kept in the San Francisco office. One of our regular books. I have received no word from the post office that that letter has not been received by Pabst Brewing Company and has not been returned to us. We send all letters out to be posted in the same way. Other letters sent to Pabst Brewing Company in the same way have been received by them. They all followed the usual routine.

Mr. DEVLIN.—I offer this letter in evidence.

Mr. POWERS.—We object to its introduction

(Testimony of E. Clemens Horst.)
unless it be shown that the Pabst Brewing Company
received it.

Mr. DEVLIN.—(Q.) You will not insist on my bringing the office boy here? If he were here he would testify that he mailed all of the letters referred to in that book. We will admit that the letter was mailed in the usual course of business.

The letter is read in evidence.

That is the reply we sent back to Pabst Brewing Company to the orders they sent to us. The letter reads as follows:

Sept. 12th, 1911.

In reply refer to H-37957.

Pabst Brewing Co.,

Milwaukee, Wis.

Gentlemen:

Enclosed herewith we return you purchase orders #54807/8 covering 500 B/-1911 Air Dried Cosumnes Hops and 2000 B/-1912 Air Dried Cosumnes Hops.

We have already sent you Hop contracts signed by us and covering the above, and are now awaiting their return when signed by you.

Yours faithfully,

E. CLEMENS HORST CO.,

Encls. E. C. HORST. [182]

Together with this letter was enclosed the two purchase orders therein referred to.

Cross-examination by Mr. POWERS.

Q. Did you ever receive any reply to this letter of September 12th, 1911?

A. Yes. When I was in Milwaukee in December,

the Pabst people told me—I am trying to remember which man it was-I can tell you who were there. There was either Mr. Stark, the secretary, or Mr. Wright, or Mr. Zaumeyer. They told me it was not necessary to do anything further about the contract; as the telegraphic correspondence was ample for the contract, and they had sent me their printed form of contract simply by mistake. That it should not have been sent. I cannot recollect which one of them was there, or whether any of them were there. It took place in the office of the Pabst Brewing Company. The conversation arose in regard to my calling their attention to having put in the two per cent discount and some other things in the printed form that they sent to me. Colonel Pabst was in Milwaukee at that time, but I do not remember whether he was there at the time we had the talk. Nothing was said. They said the telegraphic correspondence was ample and there would be no use of signing any further papers. I do not remember which one of those people that I mentioned did say it. At that time, of course, I did not anticipate any difficulty. This was in December, 1911, a few months after the sale was made.

Q. And the communications which constitute the contract occurred in September? A. August.

Q. When you were last on the stand you said you commenced to prepare for a lawsuit immediately upon the market falling, which would seem to indicate that you expected litigation with the Pabst Brewing Company. Do you know whether the Pabst

Brewing Company ever [183] had any law suit upon the rejection of hops, in your life?

- A. I have known they had many rejections, but I do not know of anybody else suing them.
- Q. Did you ever hear of a rejection except with your brother's company, the American Brewing Company?
- A. I know the general reputation in the trade of Mr. Zaumeyer's inspection.
  - Q. What other rejections ever took place?
- A. I cannot recollect any just now. Give me time and I will give you a line on them.
- Q. I would be very glad to have you do so. Do you say that you know of any rejections made by the Pabst Brewing Company except with your brother's company, the American Brewing Company?
- A. They do not reject them outright. They simply ask for a big allowance.
  - Q. Who do they ask to make the allowance?
  - A. The sellers have to make the allowance.
  - Q. What sellers have to make an allowance?
- A. I told you that I could find it out for you, but I cannot tell you right off-hand.

The COURT.—We cannot consider any immaterial matters of that kind.

Mr. POWERS.—I want to put in my rebuttal that that is not the fact.

The COURT.—He has answered that he does not know the particular instances.

Q. Don't you know that the Pabst Brewing Com-

pany has never rejected any hops except yours and your brother's?

- A. I did not say that they rejected them. They simply get an allowance on them.
- Q. Don't you know that they have asked for no allowance on hops?
- A. I will give you the data to the contrary, but just give me a little time. [184]

The COURT.—You need not bother about getting it, because I would not permit it to go in if it were here. It is a collateral fact.

Mr. POWERS.—Exception to ruling.

[Testimony of W. J. Fielder, for Plaintiff.] Testimony of W. J. FIELDER.

Direct Examination by Mr. DEVLIN.

I reside at Perkins Station. I am superintendent of the hop ranches of the Horst Company. I have been connected with it since 1896, about eighteen years. I have bought hops, inspected and graded hops and grown hops. Everything connected with it in California, including the curing, selling and buying. I have had experience in Yuba County. Sacramento County and Sonoma County. I saw the hops samples 1 to 20 and 25 to 38. I also saw certain samples that were submitted by Mr. Horst in 1912, purporting to be splits of samples sent by him to the Pabst Brewing Company, of Cosumnes hops. They were all choice Cosumnes hops. The general pick and cure of a hop. Those that were submitted to me in 1912, were good choice hops. The condition was first class.

(Testimony of W. J. Fielder.)

Q. What do you understand a choice hop to be?

A. Good color, average color, and average clean pick. Lupulin good and plenty of it. The hops examined in 1912, came up to these conditions. They were both air-dried and kiln-dried hops. I have been superintendent of the American River ranches for four *year*.

Cross-examination by Mr. POWERS.

Q. Do you pretend to be a hop expert?

A. I have done nearly everything connected with hops. I have not been in the business of buying and selling for myself, but for others. At Santa Rosa I worked for Mr. Dunham during the hops season about two months, in the Sacramento District. He bought them and I inspected them for him as to quality. The samples were tied up [185] and I examined them on the edge. They are the average size sample, not the usual size. It is not usual to have a blue ribbon tied around them. I did not disturb the inside of the sample, Mr. Sickels brought them around and asked me to give a deposition on them and I did it of my own free will. I was interested in seeing the record of Sacramento hops maintained. I am not connected with the Cosumnes hops. I was on the American River. I looked at every one of these samples and gave my judgment. I did not pick them to pieces. They were about what I would call average Cosumnes choice hops. A choice hop has good color, lupulin good, clean hop in general, and good cure. It is an average hop all the way through. Average clean, and has to be an

(Testimony of W. J. Fielder.)

average picked hop. Not necessarily uniform in color. You take the average hops and there will be two or three shades of picking in one season. may be a little green and a little yellow in the same sample, after they have been in the cooler. may be several shades of color in a crop of hops. The color of hops need not necessarily be uniform. The sample is taken from the whole crop. Each sample taken by itself should be practically uniform. Any man can pick out a berry of a lighter shade, or a darker shade, from the general appearance of the sample. The uniformity in color does not play much of a part in hops in regard to the choiceness of a sample. Hops should be of a bright color. These hops weer average bright color of Cosumnes hops of To my recollection none of the samples that season. were better than others. As far as the crop was concerned they were practically all the same. If you do not harvest them inside of three or four weeks, they will dry up and blow away. Some of these hops were picked not earlier than the average run of the season. I could not say as to that.

The COURT.—You have exhausted the cross-examination on the subject of these samples. I cannot permit you to go on indefinitely. You have cross-examined the witness sufficiently on the subject of these [186] samples.

Mr. POWERS.—I will save the exception.

Q. With reference to air-dried Cosumnes hops and kiln-dried Cosumnes hops, can you tell the difference between air-dried hops and kiln-dried hops?

### (Testimony of W. J. Fielder.)

A. I could up to a certain time. Then they commence to even up. They will age within a month or six weeks, and a person would have difficulty in telling, after they commenced to decrease in their color and everything else. It is not practical to tell the difference between an air-dried hop and a kiln-dried hop after six weeks.

# [Testimony of E. Clemens Horst, for Plaintiff (Cross-examination).]

Cross-examination of E. CLEMENS HORST (Continued).

On November 4th, 1912, we had three thousand odd bales Cosumnes hops on hand.

Q. State where they were.

A. I cannot state from memory. I can give you the data.

Mr. POWERS.—I move to strike out the testimony of the witnesses with reference to the existence of 2,000 bales at that time because he was referring to records and the records were not produced.

The COURT.—The motion will be denied.

Mr. POWERS.—Exception.

### Exception #61.

Q. Mr. Horst, did you buy any Cosumnes hops during the month of November? A. I do not think I did.

Q. Did you not in the latter part of November, 1912, buy some Cosumnes hops from Wolf-Netter & Company?

Mr. DEVLIN.—I object to that as irrelevant, incompetent and immaterial, unless it is confined to

(Testimony of E. Clemens Horst.) air-dried Cosumnes hops.

The COURT.—Yes, I think so.

Mr. POWERS.—I will take ruling on that, after I call your attention [187] to the facts. The final telegram between the parties do not refer to air-dried Cosumnes hops.

The COURT.—I have watched those carefully. I shall instruct the jury that there was no change in the contract in that respect. The objection is overruled.

Mr. POWERS.—Exception.

Exception #62. (Pages 296–297.)

Mr. POWERS.—I would like to call your Honor's attention to another fact.

The COURT.—I have ruled. I have got the whole thing in my head. If I am mistaken you are benefitted by it.

Mr. POWERS.—I will not my exception.

The COURT.—I want the case to go along. I do not want to go over those things time and time again. I keep these things in mind as I go along. I will rule on your objections.

Q. Did you buy Cosumnes hops of the same quality as air-dried Cosumnes hops in the latter part of November, 1912?

The COURT.—That is the same question, exactly. You may ask him if he bought air-dried Cosumnes hops.

Mr. POWERS.—The objection is supposed to be made sustained and I except.

The COURT.—It is the same objection. I do not

(Testimony of E. Clemens Horst.) require it to be repeated.

Mr. POWERS.—Exception.

### Exception #63.

Q. Did you buy hops in San Francisco of a character which was accepted by the trade as Cosumnes hops which could have been used as a delivery on the 4 samples numbered 21 to 24, submitted by the Pabst Brewing Company to you?

Mr. DEVLIN.—I object on the grounds heretofore stated, and on the further ground that it is hypothetical, argumentative, and asking the witness to go through a mental process for the purpose of determining whether they would be accepted or not accepted, [188] vague, indefinite and uncertain.

The COURT.—The objection will be sustained. You will confine yourself to air-dried Cosumnes hops.

Mr. POWERS.—Exception.

### Exception #64.

The COURT.—This plaintiff was not bound to make any purchases of hops that he might imagine would be accepted under his contract, when they were not the hops that were called for by the contract.

Mr. POWERS.—It is for the purpose of showing that while he sold our hops for 14 and 15 cents, that he bought other hops for 17 cents of the same character, and therefore he did not use proper care in the sale of our hops.

The COURT.—If you have reference to the same character of hops stipulated for in the contract, I will admit it; otherwise I will not.

Mr. POWERS.—It is preliminary, first, that he

bought Cosumnes hops, and then I want to show that they were of the same character commercially as air dried.

The COURT.—I understand you exactly. I will permit you to show that he bought air-dried Cosumnes hops.

Mr. POWERS.—There is no necessity of indulging in any sort of controversy at all about that. I have stated my purpose. May I now renew my objection with the purpose stated, and save my exception. That goes to all the questions.

The COURT.—Yes.

Mr. POWERS.—Exception.

### Exception #65.

On November 4th, 1912, we had a variety of hops on hand. I could not tell you what was the percentage of choice, medium or poor. I do not see how I could tell that from our records now. We did not close our office in 1911. I do not know whether we closed in 1910, or not, nor in 1909. I could not tell you that it was closed within the last ten years. On several occasions [189] we closed our Chicago office. I could not tell you when within the last ten years. In Chicago we have kept an office and paid the rent of the office when nobody was there. The office headquarters. We pay the rent for the office. The Chicago rent is \$15.00 or \$20.00 per month. Some small amount like that. We had desk-room and we simply kept on paying the desk-room rent and nobody was there. For the New York office we paid more rent, and on several occasions we have given up the office

altogether. Our Atlas contract refers to any hop that is of the quality of an Oregon hop. We could have delivered Cosumnes hops on that.

Q. Why did you deliver three bales Cosumnes hops at  $14\phi$ ?

A. This was a contract made at a different time. This contract was made at 28¢ a pound when the market was different. I do not know whether I could have used Cosumnes on that or not. If a man contracts for hops equal to Oregons we can give him Oregons, but we are not bound to give him Oregons.

With reference to the 3,062 bales on November 4th, 1913, there were 1230 bales on the ranch, 400 in Milwaukee, 448 in New York, 639 in Chicago and 345 bales on the way east.

Mr. POWERS.—Show me the record where they were on the ranch.

A. I will get that information for you.

The COURT.—Bring the records that will show where these hops were stored.

Witness produces stock-book and indicates page 211, testifying:

All hops originally were on the ranch and then my books show the date that the hops were ordered out, so the difference between.

A. I cannot give you the dates when they were stored. When they were harvested, they were on the ranch, and the harvesting ran from the beginning of August until the beginning of September [190]—as soon as they were baled.

Q. I want you to state when the 4,500 bales were stored.

The COURT.—The 4500 bales were stored when they are dried and baled.

Mr. POWERS.—I am asking him for the date.

The COURT.—He cannot give you that date. He has told you so time and time again. They were baled at different times as they went along through the season. Moreover this is wholly immaterial, when the 4500 bales were stored.

Mr. POWERS.—Exception.

### Exception #66.

WITNESS.—The dates here are going to be kind of mixed up in the respective lot numbers. Here is one bale that was cut up for samples. Lot 511. On March 10th, 1913, there were 14 bales shipped out. March 18th, 15 bales; March 31st, 15 bales; May 16th, 5 bales; November 11th, 100 bales; November 8th, 12 bales; November 13th, 100 bales; January 28th, 1913, 50 bales. Any date between October and December would be 1912, and any date from January to June would be 1913. The March 10th shipment went to L. D. Jacks. The two 15 bale lots went to Perkins. Those were some clean-ups that were rehandled. May 16th, 1913, 5 bales went to New York; November 11th, 1912, United States Brewing Company, Chicago; November 8th, Graff Brothers, 12 bales, lot 469; November 13th, 1 bale, lot 470, went to Chicago; January 28th, 1913, Suterland & Company, 50 bales, lot number 471; March 31st, George Hermann, 10 bales, lot 471; November

8th, Gottfried Brewing Company, Chicago, 100 bales, lot number 472; November 11th, United States Brewing Company, Chicago, 100 bales, lot 473; November 11th, United States Brewing Company, Chicago, 10 bales, lot 474; November 15th, Krantz Brewing Company 15 bales, lot 474; January 18th, San Francisco, 12 bales, lot 474. They were shipped to San Francisco. I do not know who the customer was. It was not myself. On January 8th, they were shipped to ourselves at San [191] Francisco. March 10th, L. D. Jacks, 1 bale, lot 475. March 18th, to ourselves at Perkins, 14 bales lot 475. Those were some of the clean-ups. March 31st, George Herman, 71 bales, lot 475. That entry L. D. Jacks, February 28th, is a cross-entry. It is on both sides of the book. One entry offsets the other. I do not know what the transaction was. November 8th, Gottfried Brewing Company, Chicago, 10 bales, lot 476. November 18th, Gottfried Brewing Company, 6 bales, lot 476. March 10th, Gottfried Brewing Company, 2 bales, lot 476. March 18th, to Perkins, 3 bales, lot 476. March 19th, Bauer-Schweitzer Hop & Malt Company, 5 bales, lot 476. March 31st, to Perkins, 6 bales, lot 476. November 14th, Chicago, 100 bales, lot 517. October 12th, Hohenade, 30 bales, lot 518. January 18th, San Francisco, 4 bales, lot 518. March 10th, L. D. Jacks, 15 bales, lot 518. May 16th, New York, 1 bale, lot 518.

Mr. POWERS.—(Q.) That means that you shipped to yourself at New York?

A. Yes. November 8th, Walter Brothers, 5 bales,

lot 519. November 7th, United States Brewing Company, Chicago, 41 bales, lot 519. November 5th, Chicago, 33 bales, lot 519. November 11th, United States Brewing Company, Chicago, 59 bales, lot 520. November 11th, 1 bale, lot 520, cut up for samples. March 10th, L. D. Jacks, 14 bales, lot 521. March 16th to New York, 2 bales, lot 521, November 13th, Chicago, 42 bales, lot 522. November 11th, United States Brewing Company, Chicago, 94 bales, lot 520. November 11th, United States Brewing Company, Chicago, 96 bales, lot 524. February 28th, L. D. Jacks, 16 bales, lot 525. March 18th, to Perkins, 7 bales, lot 526; March 31st, 14 bales to Perkins, lot 526. May 16th, to New York, 10 bales, lot 526. Now, the difference between the original crop and these shipped will represent the stock we had on the ranches. [192]

Mr. POWERS.—(Q.) Will you kindly show me any record you have of the existence of 4500 bales of that crop.

A. I will have to over this list and see because these figures do not total up 4500 bales. A lot of the stock does not ever reach this stock-book. The entries were made in this book on pages 211 and 212, about the time that these stock movements were made, by Mr. Zipsel. None of these entries have been made in the last month. The entries on the left-hand side represent the records of the stock there, and the right-hand side represents the stock movements out. Some of the lots of Cosumnes do not ever go into the stock-books, if they go out di-

rectly they are not in the stock-book, and they do not go on this page of stock on hand. When hops are baled out and shipped without ever being held on the ranch, that is stock moved out right away.

Q. Show me where there was any other kind of hops that you had on hand November 4th, 1912.

A. Here are pages 58 and 59. It shows the entire stock and the dates they were given the lot numbers. On page 58 it shows the 2341 bales, and on page 59 it shows on the other ranch 2134 bales. Making a total of 4475 bales.

Q. When were those entries made?

A. At that time. There is a discrepancy of one bale in the record.

Q. Show me an entry as to where the other goods went out, other than the other goods you have given us here.

WITNESS.—I can give you this information as well as anybody else. Joseph Schlitz Brewing Company, 100, lot 542, on August 30th. That does not necessarily mean the day that it was shipped. It simply means the day we expected to ship them.

Mr. POWERS.—Q. What is the next entry?

A. The next is the same date, Joseph Schlitz, 100 bales, lot 453. [193] That is August 30th. On September 10th, to Schlitz, 100 bales. September 10th, Schlitz, another 100 bales. Lot 455 and 456. One bale lot 457. Same date, one bale, lot 458. Same date, 100 bales, lot 459. On September 14th, Schlitz, 100 bales, lot 501, on the same date 100 bales, lot 502. Same date, lot 502, 100 bales, 100 bales lot

503, 100 bales, lot 524, 100 bales, lot 505, September 23d Gottfried Brewing Company, Chicago, 100 bales, lot 463. September 30th Peter Barman, Kingston, 1 bale, lot 451. September 30th, Kenewah Brewing Company, Charleston, 5 bales, lot 451. September 30th, Kittaning Brewing Company.

A. (Continuing.) Kittaning Brewing Company, 5 bales, lot 451. October 4th, Wooster Brewing Company, 100 bales, lot 507. October 9th, Liebert, Philadelphia, 5 bales, lot 451. October 9th, Stanton, Troy, 4 bales, lot 451. October 12th, Graff, 1 bale, lot 454. October 12th, Hinkley, Philadelphia, 4 bales, lot 518. October 14th, Cook, Chicago, 10 bales, lot 454. October 14th, Gottfried, Chicago, 2 bales, lot 454. October 17th, Citizen, 5 bales, lot 454. October 17th Eastern Brooklyn, 20 bales, lot 451. October 17th, Florida, Tampa, 5 bales, lot 541. October 22d, Cambrinus, Chicago, 5 bales 454. October 22d, George, New York, 10 bales, lot 451. October 25th, Zoloski, 5 bales, lot 454. October 31st, Bayton, 100 bales, lot 466; 99 bales, lot 467; 100 bales, lot 468; 1 bale, lot 454. October 31st, United States Brewing Company, Chicago, 100 bales, lot 508. October 31st, United States Brewing Company, Chicago, 96 bales, lot 510. October 31st, George, New York, 1 bale, lot 451. October 31st, Kenawha, 25 bales lot 454. October 31st Bellair, 15 bales, lot 454. November 7th, Frostberg—

The COURT.—You do not want anything after November 4th?

Mr. POWERS.—Q. State where you shipped any

goods, where you have a record of shipping any goods that you had on hand, Cosumnes' goods, [194] that you had on hand November 4th, 1912?

The COURT.—I think that has all been gone into.
Mr. POWERS.—He testified from memory. I
want to see the record of that.

A. Just continue with this. Frostberg, 2 bales, lot 451. Park, Providence, 1 bale, lot 451. November 8th, Gottfried, Chicago, 100 bales, lot 472; 10 bales, lot 476. November 9th, S. W. George, 1 bale, lot 451. November 11th, Eagle, Utica, 100 bales, lot 513. November 13th, Isengram, Troy, 5 bales, Park, Providence, 1 bale, lot 512. November 15th, Gutsch, 3 bales, lot 454. Same date, Pulcrabech, 1 bale, lot 460. Same date, Steil, 50 bales, lot 509. Same date, Crantz, 15 bales, lot 474. November 18th, Gottfried, 6 bales, lot 476. November 19th, Haffner, New York, 16 bales, lot 509. November 19th, Narragansett, Providence, 98 bales, lot 514. November 21st, Florida, Tampa, 10 bales, lot 451. November 22d, George, New York, 1 bale, 451. Same date, Bessemer, 5 bales, lot 454. November 23d, Springfield, Springfield, 98 bales, lot 506. November 23d, Rothhacker, 25 bales, lot 512. November 25th, 1 bale, lot 451. Same date, Park, Providence, 20 bales, lot 451. 25th, Megowan, 5 bales, lot 512. Same date, Narragansett, 2 bales, lot 509. Same date, George, 10 bales, lot 512. November 26th, Megina, 3 bales, lot 451; 2 bales, lot 512. Same date, Cook, 10 bales, lot 460. November 29th, Eastern Brooklyn, 20 bales, lot 512. Same date, Boston Beer, 50 bales, lot 515.

Same date, Bessemer, Chicago, 5 bales, lot 454. November 29th, Haffner, New York, 9 bales, lot 509, George, New York, 25 bales, lot 465. December 16th, Centerville, Cleveland, 6 bales, lot 460. Same date, Henderson, 20 bales, lot 416. Same date, United States Brewing Company, Chicago, 100 bales, lot 516. December 18th, Kuhlman, 10 bales, lot 512. December 18th, Megina, 15 bales, lot 512. December 18th, Shainhossen, 1 bale, lot 454. December 20th, George, 2 [195] bales, lot 512. Same date, Consumers, 1 bale, lot 451. December 24th, Consumers, 3 bales, lot 454. And one bale lot 460. December 24th, Jefferson, 4 bales, lot 460. December 30th, Lauer, Redding, 4 bales, lot 515. January 7th, Silverton, 6 bales, lot 460. January 7th, Centerville, 10 bales, lot 460. January 10th, Aurora, 85 bales, lot 461. January 13th, Bayton, 1 bale, lot 454. January 15th, Atz, 6 bales, lot 473. Same date, Frostberg, 3 bales, lot 473, 17th, Staemele, 2 bales, lot 460. January 17th, Cleveland, Sandusky, 91 bales, lot 520; 6 bales, lot 524. January 18th, Steiner, 33 bales, lot 519. January 18th, United States Brewing Company, 100 bales, lot 464; January 20th, United States Brewing Company, 59 bales, lot 520; 41 bales, lot 519. January 20th, Cream City, Milwaukee, 75 bales, lot 465. January 23d, Steiner, 91 bales, lot 473. January 25th, Werner, 1 bale, lot 460. Same date, Menasha, 1 bale, lot 460. 29th, Smith, 42 bales, lot 522. 31, Mobile, 15 bales, lot 461; 5 bales, lot 462. 31st Haffner, 91 bales, lot 517; 1 bale, lot 460. February 5th, Cook, 15 bales, lot

462. February 8th, Cream City, 80 bales, lot 462. February 11th, Frostberg, 8 bales, lot 517. 20, Smith, 25 bales, lot 470. 28th, Manhattan, 30 bales, lot 460. Same date, same parties, 10 bales, lot 454. 28th, Lauer, Redding, 1 bale, lot 515. March 4th, Altoona, 10 bales, lot 474; 5 bales, lot 524. March 4th, Yale, New Haven, 35 bales, lot 524. March 10th, Jacks, 15 bales, lot 518; 14 bales, lot 521; 3 bales, lot 525; 1 bale, lot 475; 2 bales, lot 476; 14 bales, lot 511; 12 bales, lot 474; 4 bales, lot 518. March 11th, Johnson, 25 bales, lot 407. March 13th, Allegiers, 2 bales, lot 417. March 14th, Cataract, 10 bales, lot 470; same date, Hopkins, 2 bales, lot 515. March 19th, Bauer, Schweitzer, 5 bales, lot 476; same date, McHenry, 1 bale, lot 460. March 31st, Centerville, 5 bales, lot 460. Same date, 1 bale, lot 519. March 31st, Herman, 71 bales, lot 475; 10 bales, lot 471. April 9th, Husting, 1 bale, lot 519. [196] April 18th, Hupsel, 38 bales, lot 470. April 30th, Vogel, 1 bale, lot 519. May 12th, Atlas, 2 bales, lot 519. May 15th, Atlas, 1 bale, lot 416. May 23d, Gamble, 5 bales, lot 511. 28th, Atlantic City, 10 bales, lot 526. June 17th, Likens, 8 bales, lot 525, July 9th, Stoudsberg, 5 bales, lot 525. July 10th, Yale, 2 bales, lot 521; 1 bale, lot 518. That is all.

Q. From November 4th, to the end of that season how many bales in all did you handle?

A. I would have to pick out the New York and Chicago offices. This includes all of the business. Includes the San Francisco business. The New York office did not know any more about the San

Francisco office than we told them. We sold the San Francisco goods in every way we could. We have certain goods on hand that we shipped out at approximate dates. November 4th on, these are approximate dates. The total amount of goods is shown by the book. The hops would be in our hands long after these dates, that I have given you.

Q. On November 4th, what was on hand?

A. Well, I do not know exactly just what hops you are referring to.

A. During the period from November 4th, 1912, to July 1st, 1913, the *shops* referred to in the book under the title "U. S. Buyers," were on hand and shipped out by your San Francisco office, were they not?

A. Those are the dates that the entries were put on the book.

The COURT.—What do you mean by the approximate dates?

A. These are the dates when the entries are made.

Q. When is the entry made,—in the order received?

A. When we hear of a shipment being moved, a lot of hops being moved, from one ranch to the buyer, or any hops being shipped to a buyer, then we enter it up of that date, as of that date. Many of these lots there will be entered up as of a certain date, and they will be on hand after that. [197]

The COURT.—Before they are actually shipped? A. Yes.

Mr. POWERS.—(Q.) These goods referred to

(Testimony of E. Clemens Horst.)
were ultimately shipped to these various purchasers?

A. These goods were shipped to these various purchasers.

Q. That business was in the hands of Horst Company during November 4th, 1912, to July 1st, 1913, was it not?

A. That was business being handled by the San Francisco office. The total number of bales we sold from the San Francisco office. The difference between 19,979 bales and 8,462 bales approximately 10,500 bales was what we had on hand November 4th, 1912. All goods raised in the Cosumnes ranch are in that book.

Q. What bales of Cosumnes hops had you then already set aside to contracts then in existence?

Mr. DEVLIN.—I object to that. He uses the words "set aside." Counsel all along seems to be of the opinion that we have to take 2,000 bales and set them aside. I object to the question as irrelevant, incompetent and immaterial.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

## Exception #67.

Q. Will you give me the deliveries and dates of delivery of Cosumnes goods that you made on your contracts which were in existence at the time of the commencement of the season in 1912?

Mr. DEVLIN.—He has already testified to that and gone over that in cross-examination.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

## Exception #68.

A. We had no sales to anybody else of air-dried Cosumnes hops except the one sale to Pabst of 2,000 bales.

Witness continues: There were no other sales for Cosumnes hops.

Q. What became of the remainder of the 3,062 bales you had on [198] hand on November 4th, 1912, after selling the 2000 bales on account of Pabst.

A. There were 150 bales or something like that of clean-ups and the balance were used by us for deliveries on prior sales of choice Pacific Coast hops.

The COURT.—He has said that before.

Mr. POWERS.—I want to get the price for which these were sold.

The COURT.—I think that is immaterial to this case.

Our claim is made up as follows: We took all of the sales of Cosumnes river hops that we made, exclusive of the clean-ups, after November 4th. That made 1500 bales, or a little over. That made a certain average price. Instead of putting the balance of the hops to make the 2000 at that same average price, we put them in at the higher average price, being the lowest sales on the contracts. We had contract deliveries for a large quantity of hops. We had advance contracts for 20 or 30 thousand bales of hops, of Pacific Coast hops, but the average of the 1500 bales made a certain figure. The 1500 bales that we sold subsequent to November 4th. So in-

stead of putting on 500 bales, on the average of the 1500 bales, I put on those 500 bales at a price higher than the average was, so that there could be no question about the amount of damages.

Q. You mean that you allowed a higher average price?

A. Yes, than for the 500 bales, as against the 1500 bales that was sold.

Mr. POWERS.—I move to strike out the testimony of the witness just given on the ground that it does not appear that any portion of these 3062 bales were in any designated as Pabst goods, or as being used by him for the purpose of completing the Pabst contract, and because in addition thereto, there was certain other goods that were sold, that were available to be used by [199] him for fulfilling the Pabst contract at an entirely different price than that given by him, and we have not the evidence of that.

The COURT.—The motion is denied.

Mr. POWERS.—Exception.

#### Exception #69.

Q. If you will give me a list of the hops that were made to fill the contracts that you then had in existence, I will be obliged to you.

A. I will pick that out for you.

Q. What reshipments were made by you of Cosumnes air-dried hops after they left the coast?

A. I will pick that out for you from the book.

Amongst the original vouchers of the New York and Chicago offices are the following (here insert

such charges as shall be selected by the attorneys for plaintiff and defendant, as being proper charges).

Q. Were these contracts that were filled with Cosumnes hops, air dried, of the crop of 1912, not included in the 497 bales, *filed* before November 4th, 1912, or after November 4th, 1912?

A. There were some contracts filled before November 4th, 1912, and some were filed after November 4th, 1912.

Q. Will you give me the list of such of them as were filled by Cosumnes hops prior to November 4th, 1912? A. Yes.

Q. I want the dates and the amounts.

A. All right.

Redirect Examination by Mr. DEVLIN.

, Q. What was the market price at the nearest available market for choice, air-dried Cosumnes hops in the month of February, 1913?

A. Between 10 and 12 cents per pound in that quantity.

Mr. POWERS.—(Q.) What was the market price at that same nearest available market for choice Cosumnes hops at that time? [200]

A. You would have a wider range of buyers if you were buying the choice Cosumnes without the air dried, because there would not have been the stigma, or the bad reputation resulting from their rejection.

Q. So far as the hops themselves were concerned, they sold by samples, and the buyers would not know the difference?

A. The buyers know everything. As soon as a lot

of hops are rejected, it is well known from one end of the country to the other.

Q. You say they were sold from 10 to 12 cents. On what do you base your figure?

A. I base it on the quantity of hops and the market conditions, and the fact that the next crop, which would be worth more money, was then selling at 12½ cents. There is no nearest available market. You have got to sell them wherever you can sell them, wherever you can sell them.

Q. Suppose you cut the quantity into ten lots of one hundred?

The COURT.—That has all been gone over time and time again. I cannot allow you to go into that sort of repetition.

Mr. POWERS.—Exception.

Exception #70.

## [Testimony of E. A. Zipfel, for Plaintiff.]

E. A. ZIPFEL, called, sworn, testified as follows:

Direct Examination by Mr. DEVLIN.

I am a hop inspector and hop buyer, and at present am working for plaintiff and have been called upon to grade hops, to determine their quality. I have been engaged in that business for about twelve years. Hops have been bought on my judgment, after inspection. I am familiar with hops grown by Mr. Horst. I attend to the making of shipments for him. Choice hops are the best average quality of any particular Section. Choice hops of the Cosumnes District are the best average quality of that

(Testimony of E. A. Zipfel.)

There is a distinction between air drying and kiln drying. I [201] have examined samples 1 to 20 and 25 to 38. They were choice hops. I am familiar with the hops that were raised on the ranch of plaintiff. We have certain lot numbers for so many bales. Merely as a matter of record. Plaintiff has several ranches and we give certain lot numbers to each ranch. For our own convenience in designating hops, we put 100 bales in a lot in general. In that way we give a lot number and I can tell from which ranch the hops come, and these lot numbers are carried through our books. I saw the hops that the samples here shown were taken from. As an expert after a hop is two years old I cannot tell the condition so far as lupulin and fatness is concerned and the aroma. I am familiar with the splits of samples kept by plaintiff in this case. The other split was forwarded to the Pabst Company and at that time the condition of the hop was choice. They were cleanly picked, as that term is understood by the trade. There is no such thing as an absolutely clean picked hop.

Cross-examination by Mr. POWERS.

I never graded hops for anyone else except Mr. Horst. All my experience with hops has been with the Horst concern. I bought other hops than Horst hops.

The COURT.—He said that he graded hops for Mr. Horst's purchases. With reference to the samples that were forwarded they were fairly clean hops. They were what I would call choice hops. They

(Deposition of E. A. Zipfel.)

were cleanly picked. They were all in one grade, but they were not identically the same kind. I saw samples 21 to 24. Some of them were Cosumnes hops. These samples were not fresh samples when I saw them first. I did not compare them with the other samples when they were first received, but a short time afterwards, I think they were Cosumnes hops. [202]

# [Testimony of E. Clemens Horst, for Plaintiff (Recalled)].

E. CLEMENS HORST recalled for direct examination by Mr. DEVLIN.

If we had not had on hand the 1500 bales out of the 2,000 sold to Pabst our overhead expense in New York and Chicago would have been less. The men employed there would have been sent into other territories, like over to England or over to Canada, to sell these hops.

Q. How much do you estimate that the overhead expenses were increased by the fact that you had to sell through agents in Chicago this 1500 bales of so-called Pabst hops?

Mr. POWERS.—That is objected to as irrelevant, incompetent and immaterial, and argumentative.

## Exception #71.

A. About four or five thousand dollars.

Cross-examination by Mr. POWERS.

The list of sales that went through the New York office were compiled from our San Francisco books.

Q. What record shows that the Cantiler Brewing

(Deposition of E. Clemens Horst.)
Company bought 20 bales through the New York
office?

A. Those are the sales not only in New York, but New York, Chicago, San Francisco and all other places. The New York office did not have sales sheets. We do not keep any New York books. This record is made from communications that come here from the New York office. On November 4th, 1912, there were 1061 bales on the ranch; and 169 bales on the ranch, 400 bales at Milwaukee, 440 bales at New York; 639 bales in Chicago; 345 bales en route to the east, making 3,062 bales.

Q. I want a record of prices obtained by you for all of these 3,062 bales that you had on hand on November 4th, 1912. You have given us 2,000 bales. Will you kindly give us what the remaining 1062 bales sold for? [203]

Mr. DEVLIN.—I will object to that as irrelevant, incompetent and immaterial.

The COURT.—I am not prepared to say that it is not proper cross-examination. If I understand Mr. Powers' theory, it is; if certain of this quality of hops, 3,062 bales, were sold at a higher figure than those that were charged to the Pabst sales, he will argue that they have as much right to the credit of those higher sales as the plaintiff has to charge them against Pabst. Is that right, Mr. Powers?

Mr. POWERS.—Yes.

Mr. DEVLIN.—May I ask a question to clear that up?

The COURT.—You may, yes.

(Deposition of E. Clemens Horst.)

Mr. DEVLIN.—After November 4th, 1912, how many bales of these hops that you call choice airdried Cosumnes hops, did you sell?

A. 1503 bales. In my statement I gave Pabst credit for some 500 bales that were sold on prior contracts. I figured up the contract both ways.

Q. Were the prices that you gave him credit for on those prior contracts higher than the prices you paid for the 1500 bales after November 4th?

A. I figured it up both ways. I figured it up on the basis of the same average, and on the basis of the higher average, for the 500 bales. The other 1062 bales were delivered on contracts on which we already had a profit because of decline in the market on November 4th.

Mr. POWERS.—(Q.) Were those sales of the 1062 bales made before November 4th, 1912?

A. Yes.

Q. So that you did not have at your command 1062 bales; they were not in your possession. They were not at your command because they had already been sold?

A. Why, no we had made sales, but we could have used the other [204] hops, or not used them as we pleased.

Q. What allotment had been made to these various contracts when the Pabst contract was breached, according to your theory, November 4th, 1912. Kindly give us the amount that the 1062 bales finally sold for.

The COURT.—They were delivered after Novem-

(Deposition of E. Clemens Horst.) ber 4th, under a prior contract.

WITNESS.—Yes. I will have to make up that statement for you. I will be pleased to make it up for you.

WITNESS.—I do not like all of my private business known to the competitors.

Mr. DEVLIN.—What Mr. Powers is asking for is entirely immaterial to this case.

The COURT.—The only question is whether or not as a matter of cross-examination he has a right to inquire into the disposition of all this quantity of hops. They are not bound to take the direct examination of the witness.

Mr. DEVLIN.—If they want to contradict Mr. Horst on that they may do that, but the idea of assuming that there were 1000 bales outside of the 2,000 bales on prior contracts, that were delivered after November 4th and not sold prior to that time is immaterial to this case.

The COURT.—They had outstanding certain prior contracts, perhaps not prior in date to the Pabst contract, but contracts for the delivery of hops characterized as Choice Pacific Coast hops. They were required to fill on those hops, but what they called for was a character of hop which were just as available for that purpose as for any other. When the breach of the Pabst contract came on it left upon their hands enough hops to comply with those contracts in excess of the 1500 bales they had disposed of in accordance with their efforts to get rid of the quantity left on their hands by Pabst, whereas, if

(Deposition of E. Clemens Horst.)

the Pabst contract had been carried [205] out, and they had been called upon to appropriate the full 2,000 bales of Cosumnes hops to that contract, they could have gone into the open market of Pacific Coast hops and got enough to fill those contracts. It was only because they had these hops on their hands that they resorted to them for the purpose of filling these prior contracts. In any respect how is it material to you what price was obtained on these other contracts?

Mr. POWERS.—We have a right on cross-examination to know how the record—

The COURT.—You have no right to bring out anything that does not tend to enlighten the jury as to the correctness of the statements of the witness.

Mr. POWERS.—If we can show that he did not have enough hops on hand to fill those orders, then I would have a right to treat the sales made by him of those hops as a part of the Pabst deal.

The COURT.—I do not think so.

Mr. POWER'S.—We will except to your Honor's ruling.

The COURT.—If that is your theory the objection will be sustained.

Mr. POWERS.—Exception.

#### Exception #72.

- Q. You were to look up and see whether there was any reduction in price to these breweries because of a rejection of Cosumnes hops in 1912, did you do so?
  - A. I have not been able to get at that yet.
- Q. I would like to have you do so before I close my case.

(Deposition of E. Clemens Horst.)

Mr. DEVLIN.—That is entirely immaterial, because the only contract Mr. Horst testified he had for choice air-dried Cosumnes hops was this Pabst contract.

Mr. POWERS.—I will follow it up by the admission on the part of Mr. Horst that they were not choice because of these rejections.

The COURT.—I will sustain the objection.

Mr. POWERS.—Exception. [206]

## Exception #73.

The following witness was called, sworn and examined on behalf of defendant.

[Testimony of Irving S. Marks, for Defendant.] IRVING S. MARKS, sworn, testified as follows:

Direct Examination by Mr. POWERS.

I am a hop buyer and grower. Have been in business for sixteen years near Sacramento. Buy throughout Sacramento Valley and in Sonoma for the sale in the United States market. I am familiar with hops commonly called Cosumnes hops. I have seen samples of those grown by the plaintiff commonly called air-dried Cosumnes hops. I have examined samples 1 to 20. With reference to sample #11, I would call it a medium hop. I would grade it medium to prime. We recognize four grades—common, prime, medium and choice. There is a grade known as fancy, but it is seldom used. Prime comes after choice in the downward grade, then medium.

Q. With reference to this sample #11, why is it not choice?

- A. It is not well picked. It is what we call a dirty pick.
- Q. Can you show the indications of that dirty pick in such a way that a person not an expert can see them?
  - A. Yes, anybody can see the leaves or stems.
- Q. Just put the samples down there if you will. Show a leaf and a stem so the jury can see it.
- A. The leaves are here and the stems are not so prominent. The leaves are the most prominent.

The COURT.—Do not talk to the jury unless you are testifying from the witness-stand.

Mr. POWERS.—(Q.) If it should appear that these samples were forwarded to Milwaukee from Sacramento in the latter part of October, 1912, then put in cold storage, taken out of cold storage once in the early part of March, and once in the latter part of March, 1913, and then again taken out of cold storage [207] in the early part of April, 1914, and brought out here by express could you still tell any of the qualifications of the samples with reference to their quality other than the clean picking?

- A. You could tell all except the flavor.
- Q. What are the requirements of a choice hop?
- A. A choice hop must be cleanly picked, well and properly dried and cured, free from the defects of vermin damage, and good flavor and uniform color.
- Q. What about the color of this sample as far as its uniformity is concerned?
- A. They are not uniform. It would prevent it from being a choice hop, and it is badly picked. Its

picking and lack of uniformity in color would be sufficient to grade it lower than choice. With reference to sample 31 shown me, it is very leafy and stemy and badly picked. It is not uniform in color. It would make a lower grade.

The COURT.—He has told you that, in that it was not a choice sample. I would not repeat the same thing about every sample. Just ask him whether it is choice or not.

- Q. How would you grade this?
- A. I would grade this medium to prime for the section that it was raised in.
- Q. Kindly show the sample to the jury. (He does so.)
- Λ. It is leafy and stemy and therefore a dirty pick. There are leaves and there are stems. Those leaves and stems are not usual in choice hops. It would prevent it from being a choice hop.
- Q. With reference to sample 33, what is its quality?
- A. It is also a dirty pick and not uniform in color. I would deem it medium to prime. With reference to sample 38, it is a very dirty pick.

(Witness shows to the jury where the dirt exists, indicating leaves and stems. This particular stem is unusually large.)

A. With reference to sample 22, it is somewhat leafy, but I would [208] call it a prime hop. It is better than samples 33 and 38. If sample 22 was the sample hop, samples 33 and 38 would not be considered commercially sufficient for delivery under

that sample. I have examined samples 25 to 38 and I have also examined samples 21 to 24.

- Q. Are samples 25 to 38 equal to the four samples 21 to 24.? A. They are not.
  - Q. Why not?
- A. They are more dirty picked, not uniform in color.
- Q. Examine samples 1 to 20 and ascertain their quality and compare with samples 21 to 24.
  - A. They are not equal in color.
- Q. What is the difference between samples 1 to 20 and 25 to 38, if any?
- A. I cannot see any particular difference. Sample 36 is only a slip off of a sample. It would not be considered a sample in the trade sufficient to make a trade upon. I know the conditions of the buying and selling market for choice air-dried Cosumnes hops in the *money* of November, 1912, in Sacraemnto County.
- Q. During the month of November, 1912, what was the market for choice, air-dried Cosumnes hops?
- A. There was no such distinction known to the trade as air-dried hops.
- Q. What would be the reasonable market value of choice, air-dried Cosumnes hops at that time, dried in accordance with the process, whereby the drying was made by forcing air from the outside in through the hops?

The COURT.—Have you any knowledge as to the distinctive market value of that character of hops from any others? A. I have not.

Mr. POWERS.—(Q.) You have seen certain samples of the Horst hops?

A. Yes, sir.

Q. What would be the reasonable market value of a hop of the character of one to twenty if it were choice, in the month of [209] November, 1912?

Mr. DEVLIN.—The witness has not been shown to have sufficient knowledge to answer the question.

The COURT.—He has already told you that he did not regard these as choice hops. Whether these hops are choice or not is a pivotal question in this case.

Mr. POWERS.—I will show you now sample 21. What was the reasonable market value of hops of that character in November, 1912?

Mr. DEVLIN,—I object to that, your Honor, on the ground that is not one of the samples.

The COURT.—Objection sustained.

Q. What was the reasonable value of choice, airdried Cosumnes hops dried under a process whereby the hot air is put into the kiln from the outside?

The COURT.—He has already answered that he does not know that there was any such distinction.

Mr. POWERS.—(Q.) What was the value of choice hops of that character dried in that manner in November, 1912?

Mr. DEVLIN.—That is assuming that he knows.

Mr. POWERS.—(Q.) If you know.

A.  $17\frac{1}{2}$  to 18 cents.

Q. How many bales would it take?

The COURT.—Could you have disposed on the market at that time of 2000 bales of Cosumnes hops at 17 to 18 cents?

A. Within a time I could. It might have taken six weeks.

Q. Suppose you cut the price to  $16\frac{1}{2}$  cents, how long would it have taken you?

Mr. DEVLIN.—That is objected to as speculative and hypothetical.

The COURT.—It is not material here at all.

Mr. POWERS.—Exception.

### Exception #75.

Q. Was the market in position at that time if the price of the [210] hops was cut down to 16 cents for the market to have taken 2000 bales, or not?

Mr. DEVLIN.—That is objected to as hypothetical and speculative.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

#### Exception #76.

Q. What was the reasonable value of the service of a broker in selling hops of that kind?

A. From a grower to a dealer one-half cent a pound. From a dealer to the brewer would be different. I had nothing to do with that on the coast. The price given by me to a grower must have a half a cent added to it as the price to a dealer.

Cross-examination by Mr. DEVLIN.

I have resided in Sacramento for two and a half years. Before that I resided in Santa Rosa, and was working for Messrs. Uhlman & Co. I am now in business for myself. Have been in business for about a year and a half, buying hops for eastern hop merchants and commission dealers. I bought for

several firms in Cincinnati, New York and St. Louis and I buy on commission. They wire us orders and we execute the orders. We go out and see if we can get the hops for that price named. I do not buy on my own account. We buy from various growers in this section, as well as in Sonoma. I cannot remember buying any hops of the Cosumnes crop in 1912, although I had offers on hops of that crop. I had orders to buy them. I examined thousands of bales including hops grown by Jacks, Kennedy, Murphy and Grimshaw. I do not think any of these hops were choice. I saw one lot of hops in a sample that were choice of that year. They were from Mr. Mayon's. I did not examine the bale. Only the sample. I do not remember of seeing other Cosumnes crop of 1912 that were choice. I examined several thousand bales. I was not located here in 1911. I saw  $\lceil 211 \rceil$ some hops of the 1911 crop, but I cannot remember the details of that. I would call Grimshaw's hops prime. They are better than the samples which are shown here. I would not say that any of the Grimshaw hops were worse than the samples shown me. Some of the Grimshaw hops were better, but even then they were not choice. Mr. Kennedy's were like to Grimshaw's. I have grown hops in Yuba County for the past two years. Seventeen acres. I have done some growing of hops, very little. I have done some of it myself about a year ago. I did not know any difference between air dried and kiln dried. I have never heard of any such distinction. I have heard that there was such a process, but I never heard

any distinction being made either way. I never examined the process for air drying as distinguished from kiln drying. I never saw the air drying process in my life, nor made a scientific study of hops. What I know about hops is buying, selling and growing them. If 5000 bales of hops were grown on one ranch I would not expect them to all be alike. They would vary some, but it would be hardly likely that they would all be choice hops. Some of them would fall below that quality. I would not think that one sample would be a fair indication of what the balance of the 5000 bales were as to color, lupulin and everything else. A choice hop must be cured properly, and must be uniform in color. It must be healthy and must not be picked immaturely. It must be cleanly picked and not too many leaves. Cured properly and baled properly. We depend a great deal upon sight in determining whether a hop is choice or not. Also by flavor. After two years' time you cannot depend upon the flavor. Other experts differ with me sometimes on minor points. We do not specify hops as to the number of points. It is hardly a matter of experience in judging hops from their appearance. Crops like Mr. Mayon's [212] and Mr. Jacks' last season would grade as high as Russian River. That is they sell for a little higher price. I examined samples of Mr. Mayon's hops in our office in Santa Rosa. We got them from our agent in Sacramento, Mr. Otto J. Cook. I have an office with only one man with me. Myself and partner. During the busy season we have a stenog-

rapher. We keep our office open all through the year. If hops were put into our hands to sell, we went out and got solicitors and keep the office open. We only charge a cent and a half a pound for selling them.

Q. Suppose I should put 2000 bales of rejected hops in your hands at the close of the season in November, 1912, that were rejected by a large brewery in the east, and you had to employ men in New York, Milwaukee and Chicago to sell some of them, and you had to hire solicitors, would you only pay them one-half a cent a pound?

Mr. POWERS.—We object to that as putting in certain elements that are conclusions of law, and not necessarily facts.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

## Exception #77.

I do not know what the charge would be. It would be more than half a cent a pound. I could not say it would be 2 cents. There is no such thing as a perfectly clean hop. There are more or less leaves in them. It is a matter of experience and judgment in the business of deciding what quantity of leaves would be permitted and the hops to be classed as choice. We do not rely on percentage at all. We have no standard as to the quantity of leaves. We know by experience. You cannot set any particular line to draw because such a question has never come up. You judge from the appearance of the hops themselves. I have no standard that I can define. It is a matter of judgment gained from experience.

In that way it is arbitrary judgment. I have seen some [213] of Mr. Horst's air-dried hops. The samples here and other samples that I have been told were air dried. If other samples had been substituted I would not have known whether they were air dried or not. It is impossible to tell the condition of those hops so far as flavor is concerned, but so far as the lupulin, you could tell. The oily substance in the lupulin evaporates, but the resinous substance remains in the hop. The oil leaves the hop upon exposure.

Redirect Examination by Mr. POWERS.

Mr. POWERS.—I show you samples 21 and 22 and ask you as to the relative value of those two samples?

A. I do not know as I can pass up on them in this light. I cannot see any difference in those samples as far as their relative value is concerned. This sample is pretty badly broken up now.

Q. What sample is that?

A. Number 25. This is one here. It has been badly handled and it is hard to determine anything about it. If I had 2000 bales of choice hops in November, 1912, to sell, I would secure a large line of samples, and distribute them throughout the United States with the different eastern houses and in my opinion it would probably take six weeks to sell them in that way.

Q. Does a choice hop mean the best average hop in a district, or what does it mean?

The COURT.—That has all been gone over.

Mr. POWERS.—This is in rebuttal of their witnesses.

The COURT.—You have gone all over that.

Mr. POWERS.—I will save my exception.

[Testimony of C. C. Sweeney, for Defendant.] C. C. SWEENEY, sworn, testified as follows:

Direct Examination by Mr. POWERS.

I am a hop merchant and have been connected with the hop business for thirty years, buying hops, selling hops, inspecting [214] hops and selling to brewers. I am familiar with the services of brokers and others dealing in the sale of hops from actual experience. I consider myself an expert in the line of passing upon grades of hops and examining hops and upon the services of men employed to sell hops. only way I know the difference between an air dried and a kiln dried is to look at the hops in the bale or by sample. I am familiar with the process of drying hops known as air dried. I worked in the first air-blast furnace that was ever used in the west. The term "air dried" refers to all hops. They are all air dried. The hot air ascends. It is applied in the drying room by a stove or otherwise.

Q. Is there any other process of drying hops than by air?

A. Some hops are partially dried in the sun. There is no other method of curing hops except by drying them by air applied by a furnace. The term "air dried" hop in a contract has no significance.

## United States

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## Circuit Court of Appeals

For the Ninth Circuit.

## Transcript of Record.

(IN TWO VOLUMES.)

PABST BREWING COMPANY, a Corporation, Plaintiff in Error,

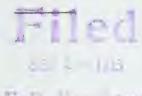
VS.

E. CLEMENS HORST COMPANY, a Corporation, Defendant in Error.

> VOLUME II. (Pages 257 to 460, Inclusive.)

Upon Writ of Error to the United States District Court of the Northern District of California,

Second Division.





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Second Division.



(Testimony of C. C. Sweeney.)

The COURT.—I am asking you what would be the occasion of putting such a term in a contract if it had no significance. You are an expert. You are not passing upon whether it has any significance or not. I am simply asking you why it was put in there.

A. It might be the power of the mind over matter. Some one suggested putting it in the *ir*. With reference to an air-dried hop, dried by the process used by Mr. Horst and another hop of the same general character dried by kiln-drying process, where they have both been equally well handled, it would be impossible to tell the difference between the product away from the kiln.

Q. Were you familiar with the value of the Cosumnes hops in the year 1912, in the month of November? A. I was.

Mr. DEVLIN.—I shall object unless the inquiry be confined to air-dried hops. [215]

The COURT.—He does not think that has any significance. I am bound to instruct the jury that it has. It characterizes the class of hops that are called for by this contract. Confine yourself to air-dried hops.

Mr. POWERS.—Exception.

## Exception #78.

- Q. Were you familiar with the value of air-dried Cosumnes hops in November, 1912?
  - A. I was. It was 183/4 cents.
  - Q. Between whom?
  - A. From grower to dealer here.
- Q. What would be the value between the dealer and the brewer in the east?

(Testimony of C. C. Sweeney.)

A. 22 to 24 cents. Delivered to any eastern point and the freight would be taken from that. would make the net value in California 201/4 to 221/4 cents. There was a market for air-dried Cosumnes hops in 1912 sufficient to take 2000 bales. tinued all during the month of November. We sell hops in September, October and November generally, and brewers buy hops at from 21 to 24 cents, delivered to the brewers. It would take a couple of months to have sold 2000 bales. The reasonable value of the services of a broker to sell hops of that kind to the brewers at that time in that particular year was one cent a pound. The dealer to pay his own expenses. I have never known a customer to pay a broker 1½ cents to 2 cents per pound and I have been thirty years in the business. In my opinion 2000 bales choice Cosumnes hops could be sold in November, 1912, provided there was a lowering in the price at that time below the price you named. There would be a good market for them. If we had cut the price one cent it would have taken two or three weeks to have sold them. I have examined samples one to twenty. [216]

# [Testimony of F. G. Ernest Lange, for Plaintiff (Recalled).]

F. G. ERNEST LANGE, recalled.

Q. You said you were familiar with the entires that appear in the books. Will you kindly show me where those 2000 bales of hops are charged in your books to the account of Pabst & Company?

A. They are not charged to Pabst & Company.

(Testimony of F. G. Ernest Lange.)

Q. Now, you say that there were a certain 2000 bales of hops on November 4th, 1912, in certain warehouses. Will you show me the record of the whereabouts of those bales on November 4th, 1912?

A. I can show you some of the records. They are in several books. We did not bring them all here. I started out to do that with Mr. Farrell.

Mr. POWERS.—I move to strike out the answer as not responsive to the question.

The COURT.—The answer is responsive to the question. I do not propose to permit you at this time to go into a detailed examination of all of these entries. You may pick out one or two items. I have no disposition to keep anything from you that you have called for in the proper way, but the Court has got to protect itself and the jury against the delay that would issue from an examination of things of this kind in the courtroom that should have been examined outside.

Mr. POWERS.—I except the statement of the Court, because my understanding of the law is that when entries in books are referred to, that we have a right to examine those books.

The COURT.—Most assuredly you have.

Mr. POWERS.—Exception.

#### Exception #79.

Q. You furnished the Court a statement from a list of entries, a list of the bales that were in various warehouses. Show me where you got that list of bales from.

A. It is impossible to show now. They are in sev-

(Testimony of F. G. Ernest Lange.) eral books, and it would take at least a week to show them all to you. [217]

Q. Show me one to them. Produce the exhibit that was filed here yesterday. You say there were 300 bales in Milwaukee. Will you kindly point out in the books where those 300 bales in Milwaukee were stored?

(Witness refers to entry under date of October 31st.) It is either that or this or that. There are 300 bales of those 400 bales here.

Q. The witness refers to entry under date of October 31st, Merchants Storage and Transfer Company, 100 bales, lot 461; 100 bales, lot 462.

The COURT.—Ask him to state what that entry is and let him read it into the record in the regular way.

Mr. POWERS.—Mr. Witness, kindly read that.

A. 100 bales, lot 461.

The COURT.—What is the date?

A. The date shown in the warehouse. September 14th.

Mr. POWERS.—What is the next date?

A. September 11th, 100 bales, lot 462. September 14th, 100 bales, lot 464. September 14th, 100 bales, lot 465.

Q. Which of those 300 bales was in the warehouse on November 4th, 1912?

A. 100 bales, lot 461; 100 bales, lot 462; 100 bales, lot 465.

Q. Now, what date did those bales leave that warehouse?

(Testimony of F. G. Ernest Lange.)

A. I wish to amend the dates on that other one. I had the Milwaukee page. This is the warehouse company's actual page. Lot 464 was not in the warehouse. The only lots in the warehouse were, October 31st, 100 bales, lot 461; October 31st, 100 bales, lot 462; and October 31st, lot 465. They left the warehouse, 100 bales, lot 461, December 30th; 100 bales, lot 462, December 30th; 25 bales, lot 465, December 10th; 75 bales, lot 465, December 30th; I wish to say that these dates are only approximate dates. They are not the [218] dates they left the warehouse. They are the dates shown in this book they left the warehouse, but those are not the correct dates. They are only approximate dates.

Q. Where can we find the correct dates?

A. By looking through a great many files in San Francisco.

The COURT.—Now, Mr. Powers, tell me what the materiality of the particular date is when they left these warehouses?

Mr. POWERS.—They came in October, and if on November 4th, 2000 bales of them had gone out, there would not be 2000 bales on hand, and the method of computing the loss, if any, would be on a different basis.

Q. Show me where the 208 bales which were in Chicago on November 4th, 1912.

A. I cannot show by this book where those hops were, that is on November 4th, without referring to a great many entries. We have a great many entries in this book that are made prior to delivery, or

(Testimony of F. G. Ernest Lange.) prior to shipment, and some of them subsequent.

- Q. How does it come that they were entered in that way?
- A. Mr. Horst explained it in his testimony the other day.
  - Q. I know he did, but I want you to explain.
- A. We order out hops from San Francisco on shipping instructions. Those shipping instructions are entered in this book. We might order out hops a month or so before they go out of the warehouse, and the date they were ordered out is shown in this book.

The COURT.—Explain how that comes about, that they remain there so long after.

- A. Our business is all handled from San Francisco and these lots are in the east. We make an order of shipment. Our instructions are to ship, and there is a line for a certain time and we order those hops to go out, and they may go out on shipment two weeks from now. We make an entry in the stock book the date we order them out. [219]
- Q. Would it be possible for a representative, like Mr. Farrell, to take this book and check them over?
- A. No, sir, it would not. The same thing holds good as to the 404 bales in New York.
  - Q. Show me where the entries are in the books.
  - A. I could not show you from this book.

Mr. POWERS.—I move to strike out the testimony with reference to Chicago and New York goods unless some entry is shown where they are contained in the books.

The COURT.—That is not the proper way to reach

(Testimony of F. G. Ernest Lange.)

it. I will deny that motion.

Mr. POWERS.—Exception.

## Exception #80.

- Q. You say there were 233 bales en route to the east?
- A. Where is the record of that? I think I can get it for you. 100 bales of lot 513, were shipped on September 30. Order notify E. Clemens Horst Company, New York. Lot 507 was shipped to order notify E. Clemens Horst Company, New York, 100 bales, September 23d. I could not tell when they arrived in New York. Lot 506, 100 bales, was shipped from Brighton, September 17th. Order notify E. Clemens Horst Company, New York City. 30 bales, lot 518, shipped to order E. Clemens Horst Company, notify John Hohenadel. It means that it is shipping to ourselves, notify him.
- Q. How does that come in connection with the transaction? A. We made a sale of hops to him.
- Q. That is the same sale that is referred to as being delivered subsequently to November 4th?
- A. It was delivered after November 4th, I believe, it is down on that list. It is one of the Cosumnes lots that we believed we delivered to Hohenadel after November 4th. [220]
  - Q. It was shipped to him October 15th?
- A. Yes, exactly. It was not shipped to him, it was shipped to ourselves.
  - Q. The sale was made to him?
  - A. Yes. With reference to the 497 bales, they had

(Testimony of F. G. Ernest Lange.)

been referred to in our testimony; they had been previously sold, but no delivery made until after November 4th. With reference to the 1503 bales all of them were sold after November 4th. No sale was arranged until it was made.

The COURT.—(Q.) Here is 30 bales that were shipped to the order of E. Clemens Horst Company, New York, notify John Hohenadel. Now, counsel, and not without reason, asked you why those 30 bales were noted here, "Notify John Hohenadel," and he asks you if that would indicate that the sale had been arranged prior to November 4th?

A. That is a part of the 497 bales that we sold previous to November 4th. It was not a part of the 1503 bales.

Q. Turn to the 474 shipped on October 29th, and see where they went to .

A. 15 bales was a part of a shipment of 20 bales. Shipped to the order of E. Clemens Horst Company, notify the Crantz Brewing Company, Finzley, Ohio. With reference to the 3062 bales on hand on November 4th, 1912, they were as follows: 1061 bales on the ranch; 169 bales on the ranch; 400 bales at Milwaukee; 448 at New York; 639 bales at Chicago; 345 bales en route east.

Q. How do you distinguish between 855 bales on the ranch, November 4th, 1912, showing the location of the 2000 bales of Cosumnes hops, from the other bales on the ranch, 1061 bales on the ranch, by the records in your book?

A. The 1061 bales includes the hops that were on

(Testimony of F. G. Ernest Lange.) the ranch as shown on that sheet. There were no records on the books of any [221] such segregation.

Q. How are you able to say which of these 855 bales of the 2000 bales on the ranch in November, 1912, were Pabst goods?

The COURT.—He has not said anything about that. They had 3062 bales of Cosumnes air-dried hops on hand, November 4th, and they did not say they segregated any. They do not claim they segregated any, that is laid aside the 2000 bales for Pabst, and laid aside other bales for others, but that they sold to the account of that contract, in obedience to a requirement that they must, as expeditiously as possible, get what they can out of the goods. They sold 2000 bales.

Mr. POWERS.—I want to find out where the records are segregating these 855 bales as having been sold on account of Pabst Company from the 1061 bales that he says were on the ranch at that time.

The COURT.—There is no testimony of any such segregation.

Q. (To Witness.) How are you able to make up this paper headed, "The location of 2000 bales of Cosumnes hops, November 4th, 1912"?

A. Because we knew 1503 bales were sold after November 4th, of which 497 bales of hops on previous sales were delivered after November 4th on such previous sales. We knew the lot numbers of those, and we knew the lot numbers of the 3062 bales on hand November 4th, so it was a very simple matter,

(Testimony of F. G. Ernest Lange.)

having that information, to take out the 2000 bales, delivered after November 4th, on the account of Pabst.

Q. Of that 497 bales thus segregated, 20 of them had been already sold to this peculiar name, Hohenadel? A. Yes.

WITNESS.—This book contains the entry of the sales made in the United States after November 4th, 1912, including not only Cosumnes hops, but all the hops sold in Chicago, New York and the San Francisco office.

Mr. POWERS.—I offer page in evidence.

The entries were as follows: [222]

ì									
							Time of		
):	ate.		Name.	Bales.	Form.	Price.		Lot.	Remarks.
912.							•		
L.	ug.	21-	J. Hohenadel	10	79	21	Oct.	518	•
L.	ug.	31-	Kitanning Brg. Co.	5		20	Immdty	451	
		18-	P. Barman	1 —		23	At once	451	
i-e	p.	25-	Kanawha Brg. Co.			23	66 66	451	
	et.	4-				16	(Oct.)	507-	-Oct. 3 strkn. out.
4.3	ug.	23-	J. Hohenadel	20	79	20	(Feb./Mar.)	518	Oct. 11 strkn out.
	ct.	4-		10		19	at once	454	
1)	et.	1-		5	79	$21\frac{1}{2}$	66 66		-Sept. 31 stkn. out.
	ct.	5-	8	2	-	18	66 66	454	
		11-				$17\frac{1}{2}$	66 66	451	;
	et. 10-			5		20	" "	454	0.1.0.13
		8-		15	79	15—1	5 Bl. Jan./Feb		-Oct. 9 stkn. out.
		16-		20		$18\frac{1}{2}$ "	Oct.	451	
		14-		5		$19\frac{1}{2}$ "	46	451	
		18-	Gambrinus Brg. Co.	5		18 "	3.7	454	,
		22-		100	79	171 "		513	
31	ct.	15-		15	_	18	at once	454	
		11-				$18\frac{1}{4}$		454	00D467 100D469
1	CL.	26-	Dayton Brg. Co.	300	79	17	100B	400	.—99B467.—100B468.—
	0.4	29-	United Pro Co	100	Sale memo.	19	66 66	516	(1B454
		30-	-	25	Sale memo.	19	66 66	454	-Former date stkn out.
lov.			Kewanee Brg. Co.	196	Sale memo.	17		509	-Oct. 31 strkn. out.
		1-	United States Brg.	100	Date memo.	11	100B	510	-Oct. 31 Strku. out.
l la	0+	20-	Dayton Brg. Co.	1		17	Delivd.	454	
		30-	F. W. George & Co.	1		19	war.	451	
		26-	Frostburg Brg. Co.	2		23	4.6	451	
		26-	Park Brg. Co.	1		181	66	451	
		1-	F. W. George & Co.	1		18	at once	451	
line	et.	26-	Park Brg. Co.	1		$17\frac{1}{2}$	" "	512	
		21-	Isengart Brg. Co.	5	<u></u>	$17\frac{1}{2}$	66 66	512	
1			0						
2			Sales of 1912 Crop C	onsumn	e Hops Made	After	Nov. 4, 19	12.	
		7-	W. P. Downey	3		17	at once	512	
		12-	Steil Brewing Co.	50		$14\frac{1}{2}$	44	509	
		12-	Park Brg. Co.	5		$17\frac{1}{2}$	44	451	
		12-	Springfield Brg. Co.	98		14	66		-Price 15 strkn out.
16	OV.	13-	F. W. George Co.	1		16	"	415-	-Price incls. 1¢ to
		10	37	* 0.0					(Geo. & Co.
		13-	Narragansett Brg.	100		16	66	509	
		15-	S. F. Rothaker Brg.	25		16	44	512	
		12-	Gutsch Brg. Co.	3		17		454	
		12-	C. A. Pulkrabek	1		163	66	460	
		16-	J. & M. Haffen Brg			15		509	0.701 510
	ov. 16		Medina Brg. Co.	5		18	" 3Bls.	451,	2 Bls. 512.
-	170"	23-	Geo. Cooke Brg. Co.	10		17	66	460	
		7-	Florida Brg. Co.	10			66	451	
		20-	F. W. George Co.	10		17‡ 16	46	512	
		15-	F. Sandkuhler	1		19	44	451	
		12-	Park Brg. Co.	15		15	66	451	
		19-	F. W. McGowan	5		164	66	512	
		26-	Boston Beer Co.	50			6.6	515	
		20-	Eastern Brg. Co.	20		16 15	6.6	512	
		22-	J. Kuhlmann Brg.				16½ await shipping		
			Co.		instructions.				
3	e.	6-	A. Bruvndonckx	1			n., Feb., Mar.	512	
		11-	F. W. George Co.	25		15	"	465	
3	e.	9-	Lauer Brg. Co.	5		15	44	515	
	23]		-						

70.1	Name.	Bales.	Form.	Price.	Time of Shipment.	Lot.	Remarks.
Date. Dec. 13- Dec. 17- Dec. 17- Dec. 18- Dec. 12-	Centerville Brg. Co. Consumers Brg. Co. Henderson Br. Co. Medina Brg. Co. F. W. George Co.	6 5 20 15 2		$     \begin{array}{r}       16\frac{1}{2} \\       17 \\       14 \\       17 \\       14\frac{1}{2}     \end{array} $	as ordered—at once	460 4 Bls. 460 512 512	454—1 Bl. 46
Dec. 20- Dec. 21- Dec. 19- Dec. 26- Dec. 31-	Jos. Haefner S. S. Steiner Jefferson B. & M. Co. Mobile Brg. Co. Silverton Brg. Co.	92 44 4 20 6			at once Mar, 15th	515 460 461 460 460	
Dec. 28- Jan. 2-13 Jan. Feb. 5-	Centerville Brg. Co. Frostburg Brg. Co. Sutherland & Co. Geo. Cooke Brg. Co.	10 3 50 15		$17$ $18\frac{1}{2}$ $17$ $151$	at once	473 462	
Feb. 7-	Manhattan Brg. Co.  Frostburg Brg. Co.	52 or 60) 8	memo.	15½ 16 16⅓	66	517 524	
Feb. 23- Feb. 19- Feb. 28-	J. Camu & Fils Smith & Capron L. D. Jacks	50 25 65		15 14	" 15 bls 3 bls 14 bls 4 bls	. 525	14 bls. 521 1 bl. 475. 12 bls. 474 2 bls. 476
Jan. 6-  Jan. 8- Jan. 13- Jan. 11- Jan. 15- Jan. 22- Jan. 22- Jan. 28- Mar. 14- Mar. 6- Mar. 8- Mar. 11- Mar. 12- Mar. 10- Mar. 26- Apl. 4- Apl. 12- Apl. 26- May 12- May 27- May 23- Jun. 5- Jun. 5- Jun. 28- July 9- [224]	Cleveland Sandusky B. Co. Aurora Brg. Co. S. S. Steiner C. H. Atz S. S. Steiner F. Staemele Werner Menasha Brg. Co. Smith & Capron Altoona Brg. Co. Yale Brg. Co. Johnson Brg. Co. Johnson Brg. Co. Cataract Consumers Hopkins & Co. Bauer-Schweitzer McHenry Brg. Co. Centerville Brg. Co. E. L. Husting A. Hupfels Sons Vogl's Indep. Brg. Atlas Brg. Co. Atlantic City Brg. E. H. Gamble Lykens Brg. Co. Stroudsburg Brg. Yale Brg. Co.	97 85 33 6 91 2 1 1 42 15 35 2 25 10 2 5 1 38 1 3 1 3 1 3 1 3 1 3 1 1 3 1 3 1 3	81	16½ 16 16 16 15½ 18 15 16 15½ 15½ 16 16 16 16 13 14 17 16 15 14 14 13 13 14 13	91 bl Feb. 1913 delved at once " " " " " " " " " " " " " " " " " " "	s. 523 · 461 519 473 460 460 522 524 470 470 515 476 460 519 470 519 526 511 525 525	6 bls. 524  1 bl. 590.  1 bl. 460

# [Testimony of C. C. Sweeney, for Defendant (Recalled).]

C. C. SWEENEY, recalled by defendant.

Direct Examination by Mr. POWERS.

With reference to samples 1 to 20 I would state their character and grade runs from medium to prime. The highest grade of those is below choice. A choice hop is one that is ripe, uniform in color, fully matured, cleanly picked, free from damage by mould and insects, good flavor, properly cured and baled. These hops do not come up to that standard in any particular. They are not bright nor uniform in color. They are not cleanly picked. They are dirty picked. They are not fully matured. is the hop had not reached the stage of ripeness when it contains the full amount of lupulin. A hop that is picked early does not contain the full amount of lupulin. Referring to sample 13, the color is mottled and is not uniform. There are green berries, brown berries and yellow berries.

Q. What should the color be in a choice hop?

A. The color in a choice hop should be uniform, whether green or yellow, it is immaterial. This sample is not a well picked hop; it is a dirty picked hop. I would grade it as a medium sample. With reference to the other samples on the table. They are a little bit better grade. But none of the better grades run as high as choice. I first saw samples 21 to 24 when I received them from Wolf, Netter & Company, in Chicago, about September or October, 1912. They were bright hops. They would grade from prime to

choice. They are fully primed, but a couple of these samples were a little bit over prime. They had defects in them that would put them out of the choice class, and would not remove them from the prime class. When we say full prime, we are putting a limit on them. They are better goods than samples The difference consists in brightness in color 1 to 20. and uniform in color and the picking is cleaner. Sample #36 is too [225] small to get a good idea of the hop. It is not a commercial sample. It is no sample. When a line of samples is submitted to the buyer, he compares that line of samples submitted to him with the type samples that are left with him and compares them, and if everything is all right, it is up to the buyer to see that as far as quality is concerned, that the quality equals the type samples. If they do not he throws them off.

The COURT.—What is meant by the word "type"?

A. That is the sample we have got to match up in delivering to him.

Q. If one sample of 25 to 38 is sufficient, would that sample be taken as a delivery, or do two or three or what number on a quantity of hops, say two thousand bales?

A. It would not. It must be the majority of the samples. The samples must be equal to the type, otherwise the deal is off. I have seen choice hops of the character "Air-dried" Cosumnes, by the process carried on by Mr. Horst. They are commercially accepted as equal to choice kiln-dried hops of the same quality. They are commercially the same

and are taken the same. You cannot tell one from the other in their physical appearance in the bale and on the market. In November, 1912, I, myself, sold from 22,000 to 23,000 pounds, on which, in my opinion, I could have made a delivery of Cosumnes air-dried hops, if they were choice. This would be be about 1500 bales. Eleven bales make a pound. This would be 1200 or 1300 bales of Cosumnes, and I probably sold 1500 bales of other choice hops of the same character. In December, 1912, I sold more That market at that time with refthan 300 bales. erence to sale of choice hops to brewers was 22 to 24¢ and there was a demand. The demand for prime and common was not as good as choice. If the defendant had had 2000 bales of choice air-dried Cosumnes hops in November, 1912, he could have sold them for from 20¢ a pound up. It would take him about a week to do so. I, myself, would have [226] bought choice air-dried Cosumnes hops in Milwaukee in 1912, as cheap as I could. I pay in November 183/4 cents and 18 cents out here on the coast for choice Cosumnes hops. They were absolutely the same commercial value as air-dried Cosumnes hops. In Milwaukee the price to the grower would have been that price plus 13/4¢ freight from California, and to the brewer at that time 22½ to 24 cents.

Q. Did you actually sell the Pabst Brewing Company some hops, of a choice variety in November, 1912, for their brewing purposes?

The COURT.—This is absolutely immaterial here. Mr. POWERS.—It goes to our cross-complaint.

We are compelled to buy hops to fill our requirements.

Mr. POWERS.—Save an exception.

Q. Are you familiar with the reputation of brewers throughout the United States with reference to their character and in the rejection of goods, and their reputation for rejecting goods? A. I am.

The COURT.—That is wholly immaterial to the issues here.

Mr. POWERS.—Mr. Horst has testified that the reason he prepared to commence his lawsuit was because the Pabst people had a reputation for rejecting goods. I want to prove by this witness that they never do reject any goods, and never have except Horst's and one other lot.

The COURT.—The evidence will be excluded, as wholly immaterial.

Mr. POWERS.—Exception.

# Exception #81.

I have examined sample 27, one-half of which was sent to the Pabst people, and the other half which was retained by Horst, and I find them to be the same character as the other samples. The effect of the blue ribbon on the green gives it a yellow cast, caused by the reflection of the light from the blue, [227] and the fact of a ribbon being run through a sample (referring to sample) prevents it from being opened unless you slip it. It is not a commercial sample. Experts in examining samples are very careful of the light they examine them in. Light is one of the principal features. You cannot tell the color and

(Testimony of C. C. Sweeney.) generally aim to have overhead light.

Cross-examination by Mr. DEVLIN.

I came from Milwaukee with Mr. Zaumeyer, at the request of Colonel Pabst, who is paying my expenses.

I have examined samples 20 to 24. They were Cosumnes hops.

I have been attempting to help Mr. Powers in the trial of this case any way I could. I have no personal interest in it whatever, except I gave those four samples and Mr. Powers asked me to help him. I am not connected with the Pabst Brewing Company at all. I am interested as a man in the business who is going to submit poor qualities of samples and get a good price on the delivery of a poor quality. I want to know it. I am against that kind of a man. I am a hop expert. There are quite a few other hop experts. There are ten or twelve in the business that are as good as I am in buying and selling hops, scattered around the country. This is the first time I have ever appeared in court, as an expert, except once in Eugene, Oregon, and the third time I have been in court. All experts know what a choice hop is. They have it in their mind's eye, and each time a sample is submitted to them they look at the sample.

Samples 21 to 24 are not choice hops, but are full prime. Prime to choice. I could not tell Horst's air-dried Cosumnes from other hops. I buy by sample. I bought more than one thousand bales of hops for the year 1912. Whether they were air-dried hops of the Horst style, or the other kind, I could not

tell, because I buy them by samples. I offered to sell several [228] thousand bales of hops that grew in the Cosumnes, but I could not tell whether they were air dried or the other way. I bought a part of the crop of Lannigan & Faust, a part of the crop of L. D. Jacks and some from Kennedy. My business is done through Wolf Netter & Company of San Francisco. They sell the hops to me. I know the general character of the hops. I can tell Cosumnes hops when I see them in the early season. I can tell it from a New York hop and from a Yakima hop. I am not familiar with American River hops nor Yolo hops. I know the general appearance of a Cosumnes hop. If hops were grown in another district and had the same characteristics as a Cosumnes hop I could not tell them from a Cosumnes hop. I bought Cosumnes for ten or twelve years, and sold them for ten or twelve years to the brewer. I have in my mind's eye what Cosumnes look like. The samples I received from Wolf Netter & Company of San Francisco, are marked as Cosumnes hops and that indicates to me the place or the region where they were grown and I have got them in my mind's eye. When I receive samples of them and I ascertain that there are so many bales of Cosumnes hops, I look at them and then I sell them for the highest price I can. I could tell them if the brand was not there. The hops that I bought from Wolf Netter were not choice hops. Samples 21 to 24 are the hops that I bought from them. I did not sell them as choice hops. I did not sell them to Pabst. I thought Mr. Pabst

was in the market to buy hops. He said he was and I gave him some samples of hops, and he could call them choice hops if he wanted to. Mr. Pabst asked me for choice hops. I gave him four samples of Cosumnes hops. I am in business for myself at Portland. I have one of the biggest offices in Portland. [229]

Redirect Examination by Mr. POWERS.

At the time I delivered these samples to Mr. Pabst he asked me for some samples of choice Cosumnes hops. He did not tell me that he was using these samples as a basis of buying hops from anyone else. When I sell a man hops and leave my samples, I make deliveries that stick. If we do not do that we get into trouble.

Q. Is any connection that you have with Mr. Pabst or with this case, such as would cause you to change your testimony in any way?

Mr. DEVLIN.—I object to that. That is a matter for the jury to determine.

The COURT.—The jury must determine that from the witness's testimony.

Mr. POWERS.—Exception.

## Exception #82.

Recross-examination by Mr. DEVLIN.

I sold some hops to Mr. Pabst myself afterwards in 1912. They were Yakimas. They were no better than Cosumnes and do not sell for better price. I got 30¢ for some of those, 24¢ and 23¢ for others.

Q. What would hops like those on the table (re-

ferring to samples 1 to 20 and 25 to 38) sell for in November 1912?

Mr. POWERS.—I object to that as not cross-examination.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

# Exception #83.

A. 18¢ in Milwaukee. About 16¢ here. The poorest of them would probably sell for 15 or 16¢ as a job lot, take them all through. You can sell a lot of that kind of hops at any time for 15½ or 16 cents. A job lot is all sorts of qualities, as these hops are, one to twenty. They run from medium to prime. If a choice [230] hop is twenty cents, a prime hop or a medium hop would be less. The four samples 21 to 24 were prime. I would not call them choice. I would call them prime. I call these other medium. You can call some of them good prime. None of them are as good as 21 to 24. Some of the hops 25 to 28 are better than 1 to 20. A little better. They are possibly prime hops. I saw choice hops in the Cosumnes crop in 1912 amongst the samples that Wolf Netter & Company sent me. I bought a lot of the 1912 hops. Some of them were prime to choice. Yes.

Redirect Examination by Mr. POWERS.

Q. If there were 2000 bales of choice Cosumnes hops on hand that had been rejected by one brewer, how would that affect the sale in the market?

A. If they were choice it would not bother the sale of them.

[Testimony of Otto E. Schultz, for Defendant.]
OTTO E. SCHULTZ, called, sworn testified as follows:

Direct Examination by Mr. POWERS.

I have been connected with the hop business for the last 33 years. Growing and inspecting hops, buying from the growers and selling to the brewers for fiften years. At the present time I am traveling for the Calumet Malt Company of Chicago and come in contact with brewers and hops are shown me daily. For a number of years I was familiar with the quality of hops by actual sale, and consider myself a hop expert. In March, 1913, I was called by defendant to their hop house and requested to look at a lot of samples. Mr. Zaumeyer and myself went into the hophouse and he took out a lot of samples from a locker and asked me to examine them and give my opinion. The line of samples are those now shown me from 1 to 20, and then he handed me four samples from 21 to 24, and then fourteen samples, from 25 to 28. They were at that time in very good condition, as far [231] as preservation was concerned. I found the quality to be what is termed medium to prime. For the reason of their uneveness in color, immaturity and dirty pick they were not choice. They were not all the same. They run in various colors, unsightly to the eye and were of more or less dirty pick. They were very dull in appearance, a dull, brassy green. Dullness affects the color of the hop because of the unsightly color, and it is evident that the hop itself is immaturely picked. Picked too early.

(Testimony of Otto E. Schultz.)

I examined sample #36 and found it rather small, too small to base a judgment upon. Samples 25 to 28, with the exception of 36 were of the character of medium to prime. They are practically the same character of hop as 1 to 20. A few samples of 25 to 38 would class as prime. I also examined samples 21 to 24, and found them very uniform in color, full in berry, and well filled with lupulin. They were prime to choice. They were not choice for the reason of the uncleaniness in picking. But for the picking they would class as choice. They were practically the same character of hop as 1 to 20. Samples 21 to 24 were hops of a better quality than 25 to 38. Samples 25 to 38 would not be accepted in the trade as hops equal to 21 to 24. Hops cannot be cured in such a way as to prevent experts from seeing the leaves in them. Commercial samples when they are wrapped in a blue ribbon or blue paper, are taken out of the paper for examination in order to determine the color of the hop, because the blue paper reflects and casts a light upon the sample, and it is deceiving to the eye as to the proper color. We take it away from the influence of the paper. With reference to the present condition of samples 1 to 20, there has not been much change from their condition as to uniformity of color at the time when I first saw them. So far as the uniformity of the sample is concerned, the change has been regular. With reference to the [232] other qualities of the samples, they do not differ at all. There is practically the same amount of lupulin, only that it is aged. The essential oils

(Testimony of Otto E. Schultz.)

have evaporated. So far as the picking is concerned the samples are in same condition to-day as they were when picked. The pick is identical. The berry is identical. The same answer applies to samples 25 to 38. They have been mussed by handling, but it does not interfere with an expert in looking at the sample. You split a sample or take a cut of it so you can more readily inspect the hop by going into each berry separately.

Cross-examination by Mr. DEVLIN.

I live in Milwaukee. Am a traveling man for the Calumet Malt Company, selling malt to brewers. They buy hops. That is the Gottfried Brewing Company, which is practically one and the same company buys hops. I came to California with Mr. Zaumeyer, and he will pay my expenses. I do not expect anything else because I am a friend of Colonel Pabst of the Pabst Brewing Company. During the days when I was in the hop business we did a great deal of business with. I was then buying and selling hops. This was 12 or 15 years ago. I have been assisting in the preparation of this case whenever requested to do so by Mr. Powers. When I examined the hops in March, 1913, Mr. Zaumeyer told me that he wished me to examine them at the request of Mr. Pabst. It was usual for me to be called by the defendant for the purpose of examining the hops at various times during the season when I happened to be there. This is the only time I was called in 1913. I was called in 1912 at various times. I do not remember any particular time but very frequently. I have never had

(Testimony of Otto E. Schultz.)

any hop law suit. This is the first time I have been in court. I also buy barley and sell malt. I cannot say how many hop experts in the United States. Everybody in the hop business is an expert. Every brewmaster in the United States considers. [233] himself an expert. There are probably four or five thousand.

# [Testimony of Milton L. Wasserman, for Defendant.]

MILTON L. WASSERMAN, called and sworn testified as follows:

Direct Examination by Mr. POWERS.

I am in the general hop business. Have been for 25 years buying and selling hops. Consider myself a hop expert. Make my living in that way and am familiar with the usages of the trade. We handle on an average of fourteen or fifteen thousand bales annually, buying and selling to the brewer through our eastern connections. We have been familiar with the prices obtained for the last ten years in the hop trade. We have seen samples of the Horst air-dried With reference to choice Cosumnes hops of that character and choice Cosumnes hops of the kilndried character, the physical character of the same, and the same figures would be obtained for them commercially. The price of Cosumnes hops, if choice, whether kiln dried or air dried, would be the same. I have examined samples 1 to 20 on this table and lotting the whole bunch together I would call them a good brewing hop. They would range be-

tween medium and prime. That is, averaging them all together. There are some better than others. I would grade the poorest of the lot, medium. I would grade the rest good brewing hop, about prime.

Q. Why are they not choice?

A. The color is lacking. They are not uniform in color. The picking is the main contention on account of their quality not being choice. There are some leaves and stems. It is not good and it is not very bad. It is not a clean picked hop. In buying 2000 bales from a lot of twenty samples, in accordance with the usages and customs of the trade, I would judge that at least 80% of the samples would have to be choice and up to the standard in [234] order to be accepted. I examined samples 25 to 38 on this table. I found them immature and some of them were dirty pick. I would grade them at about medium to good brew. These samples are not quite as good on the whole as samples 1 to 20. The reason samples 25 to 38 are not choice, is that they are lacking in color and picking principally. The samples are rather small to go into much detail on them, but looking at those samples now, being aged, we cannot judge much about the aroma of them, but from the appearance of the samples, the main contention is their picking and color. I have also examined four samples 21 to 24. They are better than 1 to 20 or 25 or 38. I would grade them as prime. The color is not quite up to choice. If I could judge of the flavor of them, if they were too fresh samples, I might be able to stretch a point, but looking at the samples now, or,

the appearance of the samples now, I would simply grade them as prime hops. The pick of them is very good. It is better than 25 to 38. I would consider them clean picked hops. If told that they had been in cold storage form November, 1912, with the exception of being taken out once or twice for investigation and then opened again in April, 1914, about three weeks ago, brought out from the east, left around the courtroom, we could not judge of uniformity of color so well, no matter if they have been kept in cold storage, when they are taken out of cold storage there is some slight difference. You can judge the color there but not as good as if they were fresh hops. So far as uniformity of color you could judge that. You could not judge the flavor at all. The reasonable value of choice Cosumnes hops in November, 1912, was 17 cents. I bought some. This would be the price to the grower. When that hop was sold to a brewer we would have to include the operating expense here, which is figured at about half a cent, and the freight 13/4 cents, and [235] the salesman's commission, say from four to six months time, to the brewer and interest on their money. They generally figure it that way. They always figure about three cents a pound expenses and operating between the grower's price and the selling price. A price of 17 cents to the grower would be a price of about twenty cents to the brewer, plus whatever profit they would ask. Probably they would generally figure one and a half or two cents. The reasonable value of the services of a broker for selling hops would be from a

half a cent to one cent a pound. The highest I know is a cent. The agent or the broker pays his own expenses. I never knew of a brokerage allowance as high as one and a half or two cents. There was very little change in the price of choice goods. Say for six months afterwards. In fact 17 cents was paid in November, December and January for Wheatlands and Cosumnes hops, which at that time were pretty close together in quality. The condition of the market was at that time better. It remained stationary right through. For lower grades, for medium grades, which were greatly in the majority in California at that time due to climatic conditions at harvest time, especially Sonoma County, why inferior grades decreased. Prices went down.

Q. Suppose you had 2000 bales of choice hops in November, 1912, how long should it have taken the market to absorb them at 17 cents to the dealer?

A. You could dispose of them immediately. There was more than that sold in one day in the buying season. That is, during those months, say September October and November. I have known times when there have been as high as twenty-four or twenty-five hundred bales sold in this locality. It all depends upon the competition.

Q. What was the competition at that time? [236]

A. Well, if someone else would sell a little cheaper, one brewer might take an inferior grade of hops, paying less money for them. I do not think it would take very long, but I do not know what time it would require. I would say about a week or so.

(Testimony of Milton L. Wasserman.)

Cross-examination by Mr. DEVLIN.

I worked for Mr. Uhlman, who is engaged in buying and selling hops. I reside in Santa Rosa. I believe my firm is a competitor of Mr. Horst and has been for several years. The Pabst Brewing Company got me to be a witness in this case. I received a telephone message from Mr. Sweeney. I never met him and never knew him, but he telephoned me, I believe, from San Francisco over the long distance telephone and asked me if I would testify in regard to the Horst-Pabst suit. I asked him what interest he had in the matter and he said simply to see that justice is done between the brewer and the grower. I asked him how he was interested in the case and he said simply to purify the trade, or some remarks similar to that and that he wanted to see fair competition.

Mr. DEVLIN.—What did he mean by that?
Mr. POWERS.—I object to that as calling for the

opinion of the witness on another man's mind.

The COURT.—It is cross-examination.

Mr. POWERS.—Exception.

## Exception #83.

A. He was probably interested in the case on account of selling to these people; probably doing business in general for Pabst or other people, and naturally took an interest in it. I do not feel that I want to knock Horst. I am perfectly friendly with Mr. Horst. I have every reason to feel that way towards him. I never met Mr. Sweeney. I talked with him about two or three minutes. I

never saw anyone until I entered the courtroom, except in consultation with Mr. Powers. I do not know that there is any [237] considerable opposition to Mr. Horst in the hop trade, except as in any other line of business. I grow a few hops, not very many. My principal business is buying hops from the growers and selling to the brewers at a profit. Middleman's profit. I do not think the middlemen have any feeling against Mr. Horst because he sells to brewers direct. There is a difference between the texture and the aroma, lupulin and general quality. In fact, there is so much difference that the brewers will pay twice as much for New York hops. There is a difference in the different varieties, or different sections of California hops. To the same extent as the difference between California hops and New York State hops, and Sonoma hops. Sonoma hops are the highest, then there would be Mendocino's next, then Sacramento Valley, according to the section. Sacramento hops rank among the lowest of those grown in California, but I have seen a good quality that would command the highest price for any section. Dealers will pay the same price for Cosumnes hops as for Russian Rivers, if they are choice. Grade for grade choice hops. There is always a difference of about one cent when the hops are not choice. I think between Sonomas and Mendocinos, the average grade, there would be two cents a pound difference, but choice hop, if it is really a choice hop will command a good price, no matter what section it is from.

There are very few choice hops raised in the Sacramento Valley. The average quantity raised was approximately 40,000 bales in the last ten years. I do not think that over four or five bales were really choice. There are several growers in that section that annually produce choice hops. I do not understand that choice hops means the best average of the district, but it means that the hops have other qualities. If you should sell me 2,000 bales of hops as choice Cosumnes [238] hops and give me the best average Cosumnes hops in that section and they were not as good as I thought hops from that section ought to be in quality and lupulin, I would not accept them as choice. If I offer to make delivery, or deliver to a brewer choice hops from a certain section and those hops are not obtainable, I cannot give him the next best grade. I would have to give him hops that would be satisfactory to him from another section. From my understanding, if none of the hops raised in the Cosumnes district were choice as compared with the other choice generally, I would not accept them as choice hops. The brewer or the man you sell to does not care how many hops are raised in the section, but all he cares about is what you agree to sell him. If I agree to sell a crop of Sonomas and the Sonomas were damaged by vermin, or there was a strike, and we could not deliver him that particular grade, we would have to make good on our delivery, under my contention. I have cured a few hops and superintend that part of the work, although I never fired, myself. I do all the dictation

as to the growing and curing on the two ranches. I hire men to do the drying for me, and the coloring is produced by means of sulphuring, which brightens the color of the hop and preserves it. Sulphur merely permits it to hold the color as it comes from the field. If a hop was picked prematurely, sulphur would not make it a mature hop. If you took a reddish hop or an overripe hop, and sulphured it, it would not make it a greenish hop or a mature hop. That would not change an overripe hop or a green hop. It would not make a good hop bad or a bad hop good. They sulphur in Germany and Bohemia. Up to the first six months the Bohemian hops are the best, then they lost their bright color. Concerning picking there is no standard to judge picking by, as to how many hops there should be in a bale, except by inspecting the hops. If you [239] find stems or leaves in opening up a sample, or inspecting a sample, then you know the hops are not cleanly picked. Commercially, there are very few. Hops cannot be picked absolutely clean. The process of drying them in the kiln decreases them in stems and leaves when they are in the bale. It evaporates some of the leaves and shrinkens the stems. If you apply a lower degree of heat that would kill the leaves and the leaves would be perceptible. New York hops are not as clean picked as California hops. Still, New York hops sell for better prices than California hops. I did not buy or sell any air-dried Cosumnes hops in the year 1912. In January and February, 1912, a contract for hops before they were

in the bale was 25 cents a pound. In 1911, they ran as high as 40 cents a pound. They dropped until the 1913 crop came in and then they went up again. Before they knew what the crop of 1913 was going to be in February, the price was at the lowest point. There is some difference between the samples shown me here. Some are better in quality and some are cleaner picked. There are some good hops among them, but not choice hops. I have seen no choice hops in this courtroom. I have seen hops from the Cosumnes district in 1912, that would grade full prime. They were Mayon's and Chalmers'. I consider those the best in that section. I would only grade those as prime hops. The only choice hops in the 1912 hops of the Cosumnes district were the hops of Chalmers and Mayon. That is, they were full prime, next to choice. From a buyer's standpoint, there were no choice hops in the Cosumnes section. There is a difference in opinion among the brewers as to how we get rid of some of our inferior goods, but there is no standard to go by except individual judgment. I have never any trouble in regard to rejections. The difference in opinion grows out of the relative degree of experince and acumen of the different experts and buyers regarding hops. There could not [240] be a very material difference in the opinion regarding the quality of hops of the experts, if the hops of the 1912 crop were kept in cold storage and taken out once or twice to be examined, then boxed up and sent out by express to California, and left in the courtroom and exposed.

A large proportion of the hops are sold shortly after the hops are picked. We sold some hops yesterday that came in from last year's crop. The ultimate consumer is the brewer and the rest of the dealers are the middlemen. Nearly every brewer has a surplus on hand. I have discussed the matter of selling hops in the latter part of the season with my people in New York, and they figure the cost between the buying end of it and the selling end of it and taking into consideration the various expenses, such as traveling and consulting with the brewers, insurance and storage at about 3 cents, and our buying expenses at this end 1/3c is included in that. There is a standard of brokerage between dealers and the market which is 1/3¢ a pound, and the 3 cents is the expense without profit. We add a profit to that which would be 1½c. Sometimes where a competitor steps in we have to sell at cost in order to hold our trade, but 11/1/2 is the average profit. I am not sure whether I could tell samples 21 to 24 from the other samples. There is some in this other lot there that I would call good prime hops. They are mingled with the other samples. I could pick out those four samples by placing them side by side among a lot of others.

Redirect Examination by Mr. POWERS.

The 3¢ expense that I talk about included freight, which is 1¾¢. The brokerage, insurance and interest would be 1¼¢ to cover buying and selling expenses, insurance etc. Stems and other extraneous matter make a dirty pick hop. There is no differ-

ence between the market price of an air-dried Cosumnes hop cured by the process used by Mr. Horst and any other dried Cosumnes hop. [241] A man who knew the market price of a kiln-dried Cosumnes hop would also know the market price of an air-dried Cosumnes hop. Sulphur does not in any manner change the uniformity of color throughout the sample. Uniformity is the principal thing we consider in passing upon the quality of a hop. The uniformity in color of a hop would not be disturbed by cold storage so far as being variegated and uniform in color. It might dull the color, however.

# [Testimony of John Mahon, for Defendant.]

JOHN MAHON, called, sworn, testified as follows:

Direct Examination by Mr. POWERS.

I am a hop grower and reside in Elk Grove in the Cosumnes district. I have examined sample 29, upon which my initials appear. That recalls to my mind that I saw it the latter part of 1912, or the fore part of 1913. It was shown to me by a Mr. Conrad and I do not remember the other gentleman's name. I examined it at that time to see whether or not it was choice. They told me the purpose of the examination at that time was that they wanted to work up a trade for Cosumnes hops with the brewers.

Cross-examination by Mr. DEVLIN.

I examined several samples. I signed a statement. The signature on the statement shown me is mine.

(Testimony of John Mahon.)

It reads as follows: "I, John Mahon, doing business at Cosumne, Hop Grower by occupation, do state.

- 1. I have had experience as hop grower with hops, for the past thirty-five (35) years at Cosumne, and that I am competent to judge the quality of Cosumnes River hops.
- 2. That I have personal knowledge of the personal crop of hops grown along the Cosumnes River in the year 1912.
- 3. That I have to-day examined sealed hop samples submitted to me by R. J. Nichols and marked X5, 6, 7, 8, 9, 10, 12, 14, 15, 17, 18, 21, [242] 22; 23; 25, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, and identified by my initials signed by me thereon, and
- 4. I say that each and all of said samples is in quality equal to or better than choice Cosumnes hops of the crop of 1912. Dated Elk Grove, Nov. 19th, 1912.

#### JOHN MAHON."

### Q. Are those statements correct?

A. No, sir. I signed it because they said that would erase the word "choice," and under those conditions I signed it. I did not consider them choice.

I signed it because I supposed the word "choice" had been erased. They said they wanted me to sign the statement to work up a trade with the brewers for Cosumnes River hops. I did not consider the hops choice. I notice that the words "better than" are stricken out in front of the word "choice" before I

(Testimony of John Mahon.)

signed it with the understanding that the word "choice" was to be erased. I did not consider the hops choice according to my opinion. I thought average was the word they used if I remember right. I do not remember the name of the other man with Mr. Conrad. I had some choice hops in 1912 according to my judgment.

Sometimes a person will make a little mistake in drying a batch of hops and get a few that may not be choice. He may make a little mistake and get them a little too hot. Maybe you will have some heat in the bale before you get them choice. All my hops were taken as choice. I could not say about the other hops grown there, because I did not see them. I think my hops were as good as the neighbors. I think Mr. Chalmers' hops were as good as mine, and I think Mr. Hoover's were as good as mine. That was all the hops I saw grown in the Cosumnes River except those samples. By a choice hop I mean a hop that is well matured, well cured, good strength, color and so on. They have got to be reasonably well [243] picked. We try to get them as clean as possible. I put all my hops in together in the season of I did not take out a certain percentage as clean hops. I sold my hops to Nebius & Drescher. I was telephoned for this morning by young Mr. Drescher and he told me what they wanted me for. He told me to tell you what I knew about the hops. I had talked to him before about this. I had talked with several people about it. About two weeks ago. Mr. Drescher did not send for me. I saw him in (Testimony of John Mahon.)

town. He did not say anything about this. I told him about these samples voluntarily. Mr. Drescher did not tell me he had any interest in this case. He knew I had examined these samples. My conversation with Mr. Drescher was very short. He did not tell me about the other growers signing statements and he wanted to see if he could not break them down. Mr. Nebius was there and nobody else. Afterwards I saw Mr. Powers at his office on Seventh Street. I went there myself. Mr. Drescher told me where it was. He told me Mr. Powers would want to see me. I went up there after lunch and there were several men in the office besides Mr. Powers. Mr. Sweeney was there and he talked to me a little. Mr. Koch was there and I do not know whether Mr. Butler was there or not. Mr. Koch and Mr. Schultz were there. I was not there more than five or ten minutes. Mr. Drescher has handled all my hops for the last twenty-five years. I do not consider myself under obligations to him.

Redirect Examination by Mr. POWERS.

If they had not told me that they were going to scratch out the word "choice," I would not have signed the statement. At the time I looked at several samples. I do not think any of the samples shown me were choice. Some were cleaner, than others, some were discolored and some were dirtier than others.

Mr. POWERS.—I introduce this paper in evidence. [244]

# [Testimony of Otto E. Schultz, for Defendant (Recalled—Cross-examination).]

OTTO E. SCHULTZ (Recalled.)

Cross-examination by Mr. DEVLIN.

I have not been directly engaged in the hop business for the last ten or twelve years. Our concern used four or five hundred bales of hops. I have nothing to do with the buying of hops. I am a malt Mr. Godfried buys the hops for the brewery, but I am in daily contact with the hop business. do not buy hops for the breweries or anybody else. I know the various sections in California, but I have never been in California before. I could not distinguish the different hops in California, but you show me the samples, and I can tell you the quality of the hops. A choice hop is a choice hop no matter where it is raised in any part of the world. A choice Cosumnes hop is as good as a choice New York hop, but it does not sell in the market for as much as a choice Bohemia hop. For the last five years the New York hop, grade for grade, bring about twice as much as the California hop. I have seen choice California hops in the various brewery offices. Some choice Sacramento County hops. A very small proportion of California hops are choice. A choice hop has not got to be a perfect hop. The Faazer hop in Bohemia is the nearest thing to a perfect hop. The reason that hops are not perfect is because they have more or less leaves bound with them, or they may be immaturely picked. Choice hop is a fixed term. The opinion of the expert decided it. There is no

(Testimony of Otto Schultz.)

Board of Trade or Chamber of Commerce that will fix the grade of hops like they do grain. It is a matter of opinion of the men who pass upon them. Where the purchaser and seller disagree as to the quality of hops, the seller must know what the term means when he sends in his samples as to the quality of his hops, and the purchaser will see that the hops delivered are the quality agreed on. They inspect the hops bale by bale with the tryer and he will call the [245] seller's attention to any defects and they settle the difference.

I would not expect to find 2,000 bales all uniform in color. They might vary in color and still be choice. They might have more or less leaves in them and still be choice, but there is no percentage that would determine it, except by inspection. New York hops are less cleanly picked than California hops on the average, but they sell at a higher price. Sometimes I can tell the difference between a California hop and an Oregon hop, but not always. The same thing applies to hops raised on the Pacific Coast and in the east. I do not think I could tell the difference between Cosumnes hops and American River hops. If you forward me a Russian River hops and they were like samples of the Cosumnes hops, I could not tell them apart. I do not think I could tell an Oregon hop, but I could tell a Bohemian hop. I could tell a European hop very easily. Bohemian hop has a smaller berry, a more uniform berry, and is cleaner picked than the American. The blue ribbon on a hop deceives your eve. It im(Testimony of Otto Schultz.)

proves the color of the hop. You cannot examine it much by artificial light. Samples 21 to 24 are prime hops. I have not seen any choice hops in the courtroom. I cannot recall just when I last saw a choice California hop. I saw them at a good many brewers' offices, but I could not tell you when. I saw some choice California hops in the growth of 1912 in the Pabst Brewing Company's offices, or hophouse. I do not know where they came from. If you had a contract to sell me a quantity of the best raised hops in that district, still if they were not up to my idea of what choice hops were, I would reject them, no matter if they were the best hops raised in that district. The difference between air-dried hops and kiln-dried hops is not commercially known. I am familiar with the air drying process as distinguished from the kiln drying. [246]

# [Testimony of Otto J. Koch, for Defendant.]

OTTO J. KOCH, called, sworn, testified as follows:

Direct Examination by Mr. POWERS.

I am a hop grower and buyer and have been in the business of growing hops since 1903, and in buying and selling hops since 1907. I make my living by selling hops and consider myself a hop expert. I deal in seven or eight thousand bales of hops a year. I have examined the hops here, 1 to 20, and consider them medium to prime. They are not cleanly picked or even in color. The worst samples are medium and the best samples are prime. I have also examined samples 25 to 38. They grade medium to prime. I

(Testimony of Otto J. Koch.)

have examined the four samples, 21 to 24. I consider them prime. Samples 25 to 38 do not compare in quality with 21 to 24. They are not so good. 21 to 24 are more cleanly picked and are more even in color. I was familiar with the hop market in 1912. The market for Cosumnes at that time was 17 or 17½ cents for choice hops. I attempted to buy them at that time. I wanted to buy a thousand bales if I could get them, choice air-dried Cosumnes of the character cured by Mr. Horst. At that time I would have bought them at that figure. This price 17 to 171/., cents was the price to the grower. I turn them over to George Proctor, who is a dealer. The commission for a broker in this market is one-half a cent. I do not know what the commission is for a broker selling from a dealer to a brewer. The market for choice Cosumnes hops in 1912, was strong.

Cross-examination by Mr. DEVLIN.

I have handled hops for Nebius & Drescher for the last couple of years. I have never worked for them. I sell for Mr. Drescher. I sold for him in the year 1912, a portion of the year. I shipped some hops for him this year. Mr. Schulz asked me to be a witness in this case. I never knew him [247] before he came to California. Mr. Drescher introduced me to him. I do believe Mr. Zaumeyer was there also. Mr. Schulz asked me if I shipped to Pabst Brewing Company and I said that I did. Also inspected goods. Mr. Schulz asked me if I would be a witness and that is all there was to it. He did not tell me what the controversy was about. This law

(Testimony of Otto J. Kach.)

suit has been common property all around. I knew about it. I heard about it more than a month or so ago. Two or three days ago I told what my opinion was of these hops. I know that Mr. Drescher does business for the Pabst Company here. A choice hop is a clean picked hop, a hop properly dried and med-There are three or four thousand bales ium color. of choice hops raised in California out of say 45,000. The percentage of hops in the Cosumnes section that are choice, are probably 1,500 or 2,000 bales out of eight or ten thousand that are raised there. Hops are all the same on the vines before they are picked. There is no difference between Russian River hops and Sacramento hops. I have done business only in Sacramento County. I do not know the difference between Yakimas and Sacramento hops. I handle Yolos, Cosumnes, and American River hops. If they are properly cured, and handled and cleanly picked I could not tell the difference. I saw the Cosumnes hops of Grimshaw, Pond, Peterson, Dietzel, Murphy, Mayon and Chalmers. Grimshaw's hops were not choice to my knowledge, nor were Peterson's. I considered three that were prime to choice. I would not say they were particularly choice.

Q. According to your idea, there were no choice hops at all in the Cosumnes district in 1912?

A. No, sir. I could not say that I have seen any choice Cosumnes hops out there. I have been familiar with the Cosumnes section since 1907. [248]

Q. According to your idea then, if a man would sell choice hops of the Cosumnes section for any year,

(Testimony of Otto J. Koch.)

it would be impossible for anybody to deliver choice hops since 1907?

- A. I think so. I have seen American River hops prime to choice. A little better than prime, but not exactly choice.
- Q. (By Juror.) Regarding the 1500 bales of hops that were delivered after November 4th, was the price agreed upon before that time or after?

The COURT.—The testimony is that the 1503 bales were sold without fixing the price after November 4th. The 497 bales of hops were disposed of according to the testimony of the witnesses under prior contract.

# [Testimony of C. C. Sweeney, for Defendant (Recalled).]

C. C. SWEENEY, recalled by defendant.

Direct Examination by Mr. POWERS.

Witness is shown samples 21 to 24. I got these samples from Wolf Netter & Co., and turned the samples over to the Pabst people and when I turned them over to them they are the same as when they came from Wolf Netter & Co. After I first got them I kept them in the Kaiserholl Hotel in Chicago. We have a place down there in the hotel to keep our samples. I gave them to Colonel Pabst sometime in October. He asked me about the hops and I gave him those as four samples of choice Cosumnes hops. He did not tell me that he wanted to send the samples out to Mr. Horst. Colonel Pabst asked me if I had some good Cosumnes hops and I told him, yes, and I delivered him these samples. At that time it was

reported in the trade that he had a contract with Horst, but I did not know that he had a contract with the plaintiff for Cosumnes hops.

Cross-examination by Mr. DEVLIN.

- Q. Are your sure that these are all Cosumnes hops?
  A. Yes. [249]
- Q. I will ask you to look at the mark there. What is the name of the grower they came from? It came from Cosumnes grower. That is a private trademark of mine. Vernon is the name I gave it. It is not a grower's name at all. I think it is the property of L. D. Jacks' crop. I gave those four samples to Pabst as choice Cosumnes hops. It was up to him to look at them. If he came back to me and wanted to buy some hops from me, then he would buy so many bales of sample 191, and so many bales of Vernons.

## [Testimony of C. S. Chalmers, for Defendant.]

C. S. CHALMERS, called, sworn, testified as follows:

Direct Examination by Mr. POWERS.

I have been in the hop business in the Cosumnes district for a little over thirty years. I know the Horst place. I visited the Horst ranch during the picking season of the year 1912 with Mr. Traganza, along about the last of August or the first part of September.

- Q. What did you observe about the picking machine? Just explain what you saw.
  - A. Do you mean for me to tell you just what I saw?
  - Q. Yes. A. Well, I will tell you.

The COURT.—What is the purpose of this?

Mr. POWERS.—To show that the leaves and stems were being put in to these hops by instructions of Mr. Horst to put them in there.

The COURT.—That has nothing to do with this case at all. It would depend upon the condition of the hops shown here.

Mr. POWERS.—I would like to make my offer so that your Honor will understand. I offer to prove by this witness that he was present while these very hops were being baled; that he saw the leaves and stems being put into the dryer, subsequently these hops were baled as they are here; that he actually saw those things with his own eyes. [250]

The COURT.—The evidence is excluded as wholly immaterial to the issues.

Mr. POWERS.—Exception.

# Exception #84.

The COURT.—Now, Mr. Powers, if this witness will testify that he knows that they were the hops that are now in controversy here, the identical hops, I will let him testify. You have got to prove that they are the identical hops, otherwise it is wholly immaterial.

Mr. POWERS.—We will connect it with the testimony of Mr. Horst, himself. Mr. Horst has testified that all of the hops were baled in one lot.

Mr. POWERS.—(Q.) At this time, while you were there, were the hops of the season of 1912 being baled?

A. Yes. They were running them from the kiln

over to the cooler before they were baled.

- Q. That was all going on simultaneously?
- Q. What operations were going on at the hophouse at the Horst ranch while you were there?
  - A. They were picking, drying and baling to.
- Q. Explain to the jury what the processes were on the ground, from the green hops to the picker, and so forth.

A. There is no man under the sun who could swear that they were the same hop, only the man that shipped the hops.

Mr. POWERS.—Q. These were hops on the Cosumnes ranch of Mr. Horst?

The COURT.—State what you saw at Mr. Horst's ranch while they were baling Cosumnes hops.

A. That is picking and all. I went up there just to see the picking machine. It was my first experience with a picking machine. I have picked by hand all my life. [251]

The COURT.—Leave out all of that. Tell us what you saw.

A. I went there to see the picking machine run and it was running. The man who had charge of the picking machine was at the picking end of it and I asked him if I could look through it, and he said "I will show you." We went to the back end where the elevator was taking the leaves into the kiln. They had canvas along there to keep the leaves from going out. The stems and leaves were going into this elevator, and I said to the man, "Don't you pick out none of the leaves."

Mr. POWERS.—(Q.) What did you do about an examination of the kiln?

A. I went up to the kiln, and the hops were powdered up in the kiln where they were drying. They went into the cooler room and there was a man there baling them. They were going into a bale, then they were putting them out on the plains in the boiling hot sun with no cover over them whatever.

Q. What was said to you by the man in charge with reference to the manner of baling the hops, so far as the leaves and twigs were concerned?

Mr. DEVLIN.—I object to that as irrelevant, immaterial and incompetent and hearsay.

The COURT.—The objection is sustained.

Mr. POWERS.—Exception.

## Exception #85.

Q. What was the condition of the hops in the Cosumnes district with reference to ripeness on or about August 12th, 1912?

A. They were green, too green to pick. They ripened from about the 20th to the 25th of August. There were no hops ready to pick before that.

Q. While you were at the Horst hop house, and seeing the picker at work in the manner in which you state, did the man in charge say anything to you about the manner in which he was picking hops so far as leaves and stems were concerned? [252]

Mr. DEVLIN.—I object to it as irrelevant, incompetent and immaterial.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

# Exception #86.

Q. Was anything said by the man in charge of the picking machine and the hop house, concerning instructions, because of certain goods that were to be used to fill an eastern order?

Mr. DEVLIN.—I object to this as simply repetition of the same line of testimony.

The COURT.—Objection sustained. The only question before this jury is whether or not the hops tendered to this defendant were of the class called for by the contract. If they were, they were bound to take them notwithstanding their objections to them at that time. If they were not, they were not bound to take them. It is wholly immaterial as to what was done on the ranch, so long as the question refers solely as to whether these hops were of the class called for by that contract. That is all we are going to inquire into here. If the hops were of the character called for by the contract, the defendant was bound to receive them. If not, the defendant was justified in refusing them.

Mr. POWERS.—Mr. Horst on his direct examination, testified that there were certain clean-ups, and that these clean-ups were baled separately. Now, on my case, I am attempting to show that the clean hops were not baled separately, and the man in charge told this witness why they were not baled separately.

The COURT.—It does not make a particle of difference whether those clean hops were baled separately, or put in the general quantity for baling.

The only thing this jury has to pass on is whether the hops thus produced were of the grade and character called for by the contract.

Mr. POWERS.—We think it is in rebuttal of Mr. Horst's testimony. [253]. I will save my exception

WITNESS.—(Continues.) I examined certain samples of hops that were shown to me by Mr. Conrad from Mr. Horst's ranch, in the latter part of the year 1912. There was another man with him. I have forgotten the other man's name. I put my initials on the back of the cardboard, on some of them. I am familiar with the process of curing and handling hops and the character of hops. The character of the samples of hops that were shown to me by Mr. Conrade were not first class hops because they had a lot of leaves in them and a lot of stems in them. This man came down there and showed me some samples and said we were not getting what we ought to get for our choice Cosumnes hops. They said, "We have some samples here for you to look at, that we are going to get a better price for. We have a man in the east who is looking out for them, and we are going to get a better price for Cosumnes hops." They wanted me to look at them. I looked at them and told them I would sign the statement, but not as choice hops. They were green samples. The samples they showed me were green. They had leaves in them and stems.

Cross-examination by Mr. DEVLIN.

I was asked to testify in this case by Mr. Butler, this morning. Last Saturday when I was coming

to Sacramento I met Mr. Spicer and Mr. Schulz on the road. Mr. Spicer said "I want to introduce you to Mr. Schulz." I have known Mr. Spicer for a good many years. We stopped and shook hands and Mr. Schulz said, "When can I see you in Sacramento?" That was last Saturday about fourteen miles from Sacramento. They were in an automobile with Mr. Spicer's wife, and another gentleman I do not know. This morning was the first time I was asked to testify. They asked me if I knew anything about these samples. Mr. Butler at his office. Mr. Butler and Mr. Schulz were there. I sell [254] my hops to anybody that comes along. I have a contract with Mr. Drescher. I have been selling hops to him for twenty or twenty-five years. I have at times received advances from him. There ain't a hop man but what does. I have a few of my hops contracted for in advance with Mr. Drescher. The paper shows my signature (referring to statement presented by Mr. Devlin). They told me they were trying to get a better price for the Cosumnes River hops and I surely told them the truth. I told them I would not sign them as choice hops. I did not know whether they were telling the truth or not. I never read the paper, I was hard at work putting up my hops. I thought they were honest men, which I found out afterwards they were not. They showed me these samples and got me into court here and I did not know anything about it. If I had, I would not have signed it. I never knew there was anything wrong one way or the other with the paper when I signed it.

I never read it through.

Q. When you signed that, did you tell the truth?

A. As I stated before, when I signed it I said that the samples were not choice hops. I never put that in the paper. I say was out in the field working when the gentlemen drove up the hop house. I do not live down at the hop-house. I live about 2 miles away. When those men came here, I was working hard. I did not pay much atttenion to them. If I had had time I would have read the paper over to see what it was. As I said before I was doing it just to help them out. They said they were going to get a better price for Cosumnes River hops and I signed that, but not as choice hops. I would not have signed anything in the world like that if I had stopped to read the paper over. I was hard at work in the field. I am nearly fifty years old. I know one of these gentlemen here, Mr. Conrad. I know I signed some papers.

Mr. DEVLIN.—I introduce this paper in evidence as a part of my cross-examination. It reads as follows: [255]

- I, C. C. Chalmers, doing business at Cosumne, hop-grower by occupation, do state.
- 1. I have had experience as hop grower with hops for the past thirty (30) years at Cosumne, and that I am competent to judge the quality of Cosumnes River hops.
- 2. That I have personal knowledge of the personal crop of hops grown along the Cosumnes River in the year 1912.

- 3. That I have today examined sealed hop samples submitted to me by R. J. Nichols and marked X5, 6, 7, 8, 9, 10, 12, 14, 15, 17, 18, 21, 22, 23, 25, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, and identified by my initials signed by me thereon, and
- 4. I say that each and all of said samples is in quality equal to or better than choice Cosumnes hops of the crop of 1912. Dated at Cosumne, Nov. 19, 1912.

#### C. S. CHALMERS."

There were no choice samples that I saw. They were all about the same. Some of them were a little cleaner and some were brighter in color, but none of them were choice.

Redirect Examination by Mr. POWERS.

Mr. Chalmers, as I understand it, when these gentlemen came to you and asked you to sign this paper—

The COURT.—Just a moment, do not repeat what the witness has said. Ask him anything you want to.

Mr. POWERS.—(Q.) What did you say to them about signing the paper with reference to the quality of the hops?

A. Well, I told them I would not sign as choice hops.

Q. At that time, you say you were employed taking care of your crops?

Mr. DEVLIN.—I object to that.

The COURT.—That has all been gone over.

Mr. POWERS.—Exception.

Exception #87. [256]

# [Testimony of Edward Traganza, for Defendant.]

EDWARD TRAGANZA, called and sworn, testified as follows:

Direct Examination by Mr. POWERS.

I am a farmer by occupation. I know Mr. Chalmers who has just left the witness-stand. In the latter part of August I went to the hop yards of Mr. Horst with Mr. Chalmers. We saw the hop dryer in operation. We stayed there probably two hours or something like that.

Mr. DEVLIN.—I object to this testimony as evidently in line with the previous testimony of Mr. Chalmers. I object to it as irrelevant, incompetent and immaterial.

The COURT.—Is it to the same purpose?

Mr. POWERS.—Yes.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

### Exception #88.

Mr. POWERS.—So I may make the record clear. The COURT.—You say it is the same as Mr. Chalmers' testimony. You have your exception to that.

Mr. POWERS.—All right.

Mr. POWERS.—(Q.) Did the man in charge of the picker state what his instructions were with reference to the manner of handling the leaves and twigs?

Mr. DEVLIN.—I object to that as irrelevant, incompetent and immaterial.

The COURT.—Same ruling.

(Testimony of Edward Traganza.)

Mr. POWERS.—Exception.

Exception #89.

Mr. POWERS.—Mr. Butler has just called my attention to some of the testimony that has been given that may modify your Honor's ruling. Mr. Horst has testified that all of the bales were uniform in character and that one was the same as the other; and that there was no difference in the manner in which they [257] were baled. That none of the 2000 bales sold for Pabst was segregated. They were taken in a general lot.

The COURT.—I remember the testimony perfectly that has gone in here. It absolutely has no sort of bearing upon the question that the jury is called upon to decide, how those hops were baled, or what the condition in regard to the picking was.

Mr. POWERS.—We offer to show that the plaintiff willfully made the hops so unclean that it would be impossible for the samples to be in proper condition; that he wilfully included stems and leaves, and said he was doing so because he had to make weight on account of the fact that he had a contract in the east. The testimony is that there was only one contract.

The COURT.—If you can show anything of that kind, I will let you show it.

[Testimony of C. S. Chalmers, for Defendant.] C. S. CHALMERS, recalled by defendant.

Direct Examination by Mr. POWERS.

The COURT.—If you can show that the plaintiff stated, that, not some man on the ranch, but if you

can show that the plaintiff has made a statement of that kind, I will let you show it.

Mr. DEVLIN.—I would like to ask if Mr. Powers in good faith intends to prove that Mr. Horst said that, and not some man on the ranch.

Mr. POWERS.—Not Mr. Horst personally, but a man in charge of the work for Mr. Horst at that time.

Mr. DEVLIN.—That has been ruled on before.

Mr. POWERS.—I want to show by the man who was in charge of the property at that time, your Honor. This man was in charge there and represented Mr. Horst at that time.

Mr. DEVLI.N—Your Honor has ruled that he may show that Mr. Horst made a statement of that character. He cannot show that somebody else made that statement. [258]

The COURT.—The plaintiff is a corporation. Of course, Mr. Horst may be the principal owner, but one employed by a corporation can bind the corporation by his statements, if he is shown to occupy the proper relation. I cannot tell.

Mr. POWERS.—(Q.) Will you tell me who you saw at the hop house at the time you were there in August, 1912?

- A. I cannot tell you the man's name.
- Q. What was he doing?
- A. He had charge of the picking machine.
- Q. How many men did he have under him?

Mr. DEVLIN.—I object to that on the ground that he does not know that of his own knowledge.

The COURT.—(Q.) Do you know anything about

(Testimony of C. S. Chalmers.) who the man was?

A. I do not, only that he had charge of the picking machine. He told me he had. He took me about the house and showed me various places and gave orders to the men about the place. I guess the men obeyed him. They seemed to do the work as he told them. He told them how to take the hop vines down and put them in the picking machine. He had nothing to do with the bales that were outside, but with reference to the drying process he had nothing to do with that. He had charge of the picking machine.

Q. What, if anything, was said by the man in charge of the picking machine concerning instructions with reference to the hops that were going into the picking machine?

Mr. DEVLIN.—I object to that on the ground that it is irrelevant, incompetent and immaterial and hearsay.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

## Exception #90.

Mr. DEVLIN.—What ranch were you on at that time?

A. The Murphy ranch.

Mr. DEVLIN.—I would like to have Mr. Chalmers brought back here for cross-examination. Yesterday he testified as to a certain [259] conversation, or certain acts being done. We have assembled all of the men that were on the Murphy ranch. They are all in the courtroom here. I want Mr. Chalmers to point out the gentleman he claims he had any

conversation with. I withdraw our objections that we made to that testimony. I will give them the full chance. I would like to have Mr. Chalmers brought back here for further cross-examination.

Mr. POWERS.—I have no objection to it at all. I have no more control over Mr. Chalmers than you have.

The COURT.—I suppose he went away thinking that you were through with him.

Mr. BUTLER.—I think I can get him.

Mr. POWERS.—Do you want Mr. Traganza also? Mr. DEVLIN.—Yes.

Thereupon the deposition of GUSTAV PABST was read.

[Deposition of Gustav Pabst, for Defendant.] Witness sworn.

Direct Examination by Mr. SPOONER.

I am and have been since 1904, president of the Pabst Brewing Company, and familiar with the complaint and answer in the case, in every important detail. Mr. Zaumeyer and myself conducted the negotiations involved the 2000 bales of choice hops referred to in this action. Mr. Zaymeyer is a grain and hop buyer for my concern and as such passed upon the acceptability of hops which were offered for purchase. I remember in a general sort of a way the receipt of the night letter dated San Francisco August 21, 1911, referred to in Page one hereof, from E. Clemens Horst Company, and also the telegram to E. Clemens Horst Company dated August 25th, 1911, referred to in Page 2 hereof, and night letter dated August 25th,

1911, addressed to Pabst Brewing Company, referred to at Page 2a hereof, and a day letter addressed to plaintiff August 26th, 1911, referred to at Page 2a hereof. I am familiar with the letter of August 24th, from E. Clemens Horst Company to Pabst Brewing Company, as follows: [260]

# E. CLEMENS HORST COMPANY. FIRST NATIONAL BANK BUILDING. CHICAGO.

August 24th, 1911.

Pabst Brewing Company,

Milwaukee, Wis.

Gentlemen:-

In reply to your inquiry, we make firm offer of 500 bales 1911 crop "air-dried" Cosumnes at 40 cents, delivered in Milwaukee. Shipment between August and December, 1911, at your option.

This offer is made subject to sufficient extension in time for shipments and *or* deliveries to cover any and all delays arising from extraordinary conditions beyond seller's control.

Terms net cash upon receipt of hops.

Yours truly,

## E. CLEMENS HORST COMPANY,

GSG-M. By G. S. C.

—and recall the receipt of this letter. It refers to 500 bales of the 1911 crop at 40 cents. That transaction was consummated by the delivery of said five hundred bales and the use thereof by the Pabst Brewing Company. The shipment of the 1911 crop was between August and December, 1911. I remember

the telegram from plaintiff dated August 29th, 1911, referred to at Page 2a and 2b hereof, and also one from defendant, dated August 28th, 1911, referred to at Page 2b hereof. Also night letter dated August 27th, from plaintiff, referred to at Page 2b hereof, and telegram dated August 28th, from Pabst Brewing Company, referred to at Page referred to at Page 2c hereof. Also letter dated September 4th, 1911, from plaintiff to defendant. I remember its receipt. The letter reads as follows:

Sept. 4th, 1911.

In reply refer to H-39811.

Pabst Brewing Co.,

Milwaukee, Wis.

Gentlemen:-

Enclosed herewith we hand you contracts in triplicate for the two lots of 1000 bales Choice Pacific Coast 1912 crop Air Dried Cosumnes Hops, as per telegraphic sales made you on August 26th, and August 29th respectively. [261]

Please be good enough to sign all three contracts of each set and return two of each set to us.

If you do not wish the sharing clause (clause 18) of the contract, please strike it out, and in that case the elimination of that clause will be satisfactory to us.

We appreciate your orders and confidently expect that the contract will result in a considerable profit to your good selves.

At this time, we beg to suggest again the advisability of your contracting a further quantity of 1912

crop and especially as to your contracting for a term of year d beginning with 1913 and on such a contract we will make you a specially low price.

Faithfully yours,
E. CLEMENS HORST CO.

ECH/J.

E. C. Horst.

Encls.

P. S. Also enclose contract in triplicate covering 500 bales 1911 crop Choice Brewing Pacific Coast Air Dried Cosumne Hops, as per sale of August 23d.

The enclosed drafts read as follows:

#### HOP CONTRACT.

[Written across face: "Duplicate."]

- (1) Parties: Memorandum of agreement made by and between E. Clemens Horst Co. (a coropration), Hop Growers, hereinafter referred to as the "Seller" and Pabst Brewing Co., of the City of Milwaukee, Wis., hereinafter referred to as the "Buyer."
- (2) Quantity: The Seller agrees to sell to the Buyer One Thousand (1000) Bales Hops about equal to or better than Choice Brewing Pacific Coast Air Dried Cosummes Hops of each of the crops of the years 1912.
- (3) Place of Delivery: Said Hops to be delivered on or at cars or ex dock or store Milwaukee, Wis., or at the Delivering Lines' Terminals convenient thereto.
- (4) Price: Buyer agrees to pay on each bale of hops at the rate of Twenty (20) cents per lb. (Tare 5 lbs.) Plus Freight from Pacific Coast. Terms Net

Cash or Sight Draft against Bill of Lading.

- (5) Time of Shipment etc.: Time of shipment and/or delivery during the months inclusive of September to December following the [262] harvest of each year's crop, with such extra time as provided in paragraphs 12 and 16 endorsed hereon.
- (6) Separate Bales: It is agreed that this Contract is severable as to each Bale.
  - (7) Default.

The Seller may treat entire *unfilfulled* portion of this contract as violated by the Buyer upon or at any time after Buyer's refusal to pay for any hops, or any note or acceptance given in payment for Hops that have been delivered and accepted hereunder, or if this contract or any part of it is otherwise violated by the Buyer.

(8) Conditions. This Agreement is subject to the printed conditions endorsed hereon.

Dated: Dated at San Francisco, Aug. 29th, 1911.

For the Buyer.

[Seal] E. CLEMENS HORST Co.

Per E. C. HORST.

Pres.

For the Seller.

#### ENDORSEMENTS:

(9) Freight, etc.

If any delivery hereunder is subject to freight, storage, duty, and/or any other charges for which under the terms of this Agreemnt Seller may be lia-

ble, Buyer shall pay such charges and charge same to Seller.

## (10) Discount.

Upon or at any time after delivery of any hops hereunder, Seller shall be entitled to net cash payment for the same by allowing to the Buyer interest on the unpaid portion of the account (if the hops are sold on time) at the rate of 6% per annum for any unexpired term of credit. [263]

# (11) Freight Rate.

The contract price herein is based upon an East-bound Transcontinental Rail Freight Rate on Hops of \$1.50 per 100 lbs. in Carloads of 15,000 lbs. minimum and \$2.00 per 100 lbs. in less quantity, and if the freight rate at time of shipment of any hops delivered hereunder shall be less or more than such rate, the difference in freight rate shall be respectively for or against the Buyer.

## (12) Delays.

Buyer gives to the Seller sufficient extension in time for shipments and/or deliveries under paragraphs 5 and 16 to cover any and all delays arising from Fires, Riots, Strikes, Car Famines, Blockades, Wrecks, Quarantines or other extraordinary conditions beyond Seller's control.

# (13) Prior Delivery.

Seller has privilege of making deliveries hereunder at any time prior to that herein specified for delivery, but in case of such prior delivery Buyers shall be entitled to allowance on the hops prior delivered, to cover all the ordinary carrying charges of Interest, (Deposition of Gustav Pabst.) Storage and Fire Insurance.

(14) Difference in Quality.

Difference, if any, between quality sold and quality hereunder shall entitle Buyer to equivalent allowance but not to rejection of delivery.

(15) Claims, etc.

The Buyer waives all rights to rejection or to allowances on any delivery on account of quality unless such claim be delivered to Seller by telegraph or in writing within 5 days after arrival of the hops at place of delivery, and unless such claim be so made prior to Buyer's exercise of any right of ownership of the said hops. [264]

(16) Subsequent Shipments.

If for any reason the Buyer shall be dissatisfied with, or object to all or any part of any lot or lots of hops delivered hereunder, the Seller may, within 30 days after receipt of written notice thereof, ship or deliver other hops of the contracted quality in place of any objected to.

(17) Quality.

The delivery by sellers of hops of a quality at least as good as any accepted by buyers from sellers on any then previous delivery under this or similar quality specifications, shall be a compliance as to quality under this contract.

(18) Sharing Advance or Decline Beyond 10¢ Per Pound.

Whenever at time of any delivery or part delivery hereunder, the market price of hops of the contracted quality, at place of delivery, shall be more than Ten

cents per lb. either higher or lower than the within contract price, the excess over such Ten cents per lb. shall be equally divided between buyer and seller.

(19) Non-Transferable without Seller's Consent. The Buyer shall have no right to sell, transfer or assign this contract or any of the Buyer's rights or benefits thereunder without first having obtained the written consent of the Seller. [265]

The Pabst Company never signed either of said agreements or any similar agreement. I was familiar with the paper marked purchase order #54,808, dated September 8th, 1911, by H. J. Stark, Secretary.

To the best of my recollection Purchase Order #54,808 was never returned by E. Clemens Horst Company. I do not recollect any correspondence or negotiations between plaintiff and ourselves respecting purchase order #54,808, after it was sent to the plaintiff. A thorough search has been made for a letter from E. Clemens Horst Company and between Sept. 8th, 1911, and Sept. 28th, 1912, and none has been found.

It is stipulated and agreed that Colonel Pabst in giving his testimony concerning several letters and telegrams which, according to the language of the question or answer, have been presented to him, has referred not to originals as being before him, but to the copies attached to a stipulation entered into between the parties concerning said letters, except the two drafts or contracts, last referred to, I remember the receipt of a letter dated September 28th, 1912, signed by the plaintiff and addressed to the defendant, Pabst

Brewing Company, relied upon the fact that the plaintiff sent the samples as evidencing plaintiff's compliance with the demand as to samples made in the purchase order.

Mr. DEVLIN.—I object to the question as leading, improper in form, and calling for testimony that is utterly immaterial and irrelevant.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

#### Exception #91.

Q. You may state whether or not as the question was put to you, you relied upon that understanding of the conduct of the plaintiff?

The COURT.—Same objection, ruling and exception.

Q. You may state whether or not the sending of the samples, as [266] evidenced by the letter of September 28th, 1912, influenced your mind as to the acquiescence of the plaintiff in the necessity for sending samples.

The COURT.—Same objection, ruling and exception.

A. I remember that defendant received a line of samples 1 to 20, about October 1st, 1912. I remember the sending of letter dated October 4th, 1912.

Q. Now you may state why, if you have any reasons your considered that E. Clemens Horst Company sent samples one to twenty.

Objected to as leading, immaterial, incompetent and improper.

Objection sustained. Exception.

Q. Why did E. Clemens Horst send samples at all? If you have any reason for your belief that they did have any reason, or did not have any reason, to send them, please state one way or the other?

Same objection, ruling and exception.

I remember receiving a night lettergram dated October 9th, 1912, samples 1 to 20 when received were inspected by Mr. Zaumeyer, as to quality. After he had inspected them he reported to me if they were, in his judgment, what they should be in quality. He always reports to me the quality of the samples that are sent in whether they are or are not up to quality. He reported that samples 1 to 20 were not up to quality. They were not choice. I remember that the Pabst Brewing Company sent the telegram dated October 9th, 1912, saying that the samples showed no life. Picking poor and the like. I remember letter October 10th, 1912, from defendant to plaintiff and receipt night lettergram, dated October, 1912, from plaintiff and also letter dated October 14th, 1912. We sent the four samples so-called choice Cosumnes hops therein referred to, to plaintiff. I remember seeing night lettergram dated October 15th, 1912, and letter of the same date. I remember sending night lettergram dated October 21st, 1912, [267] reading as follows:

Milwaukee, Wis., Oct. 21–12.

E. Clemens Horst Co.,

San Francisco.

Will accept hops on tract equal to four samples

you received from us but insist upon you forwarding samples of deliveries before shipments go forward.

#### PABST BREWING COMPANY.

Also remember receiving letter from plaintiff reading as follows:

San Francisco, October 24, 1912.

In reply refer to H-55641.

PABST BREWING CO.,

Milwaukee, Wis.

Gentlemen:

We received your wire of October 21st, as follows: "Will accept hops on contract equal to four samples you received from us but must insist upon you forwarding samples of deliveries before shipments go forward."

The above wire was no doubt sent before your receipt of our letter of October 18th, and we are now awaiting your reply to our above letter.

Faithfully,

E. CLEMENS HORST CO.,

ECH/PK.

E. C. HORST.

Also letter dated October 23d, 1912, from defendant to plaintiff, reading as follows:

PABST BREWING COMPANY.

Milwaukee, Wis., October 23d, 1912.

E. Clemens Horst Company,

San Francisco, Cal.

Gentlemen:

Your favor of the 18th inst., at hand and contents noted.

We beg to state that we never committed ourselves not to take the 2000 bales of Choice Cosumnes hops on contract, equal to the four samples we submitted to you, as you will note in our telegram to you of October 21st, to which we have no reply at the present time, in which we asked you to forward samples of deliveries you can make equal to the four samples mailed you, and furthermore, we beg to state that there was no specified time mentioned when hops were to be shipped, and the entailed loss you have had up to the present time by holding these hops has nothing to do with this deal whatever. If you could have delivered choice Cosumnes equal to the four samples mailed you we would have accepted same, but insisted on you forwarding samples, which you have not done up to the present time. We certainly would not accept any Cosumnes equal to any of your 20 samples submitted to us, as the quality is too poor. Furthermore, we beg to state that our relying to dispose of same on the Coast would not prevent you from forwarding samples, as we must insist upon seeing what we buy. [268]

We are also desirous of letting you know that we use Cosumnes and Sacramento hops in our brewery, but of a much better quality than any of your samples submitted. What we have published is that we would not use any more Cosumnes like your 1911 shipment, which you must admit were the poorest picked hops on the Coast. We are also not at liberty to let you know from whom we received the four samples choice Cosumnes, but must insist upon you

forwarding samples of choice Cosumnes equal to the four samples, whether you have same in stock or not.

Hoping to hear from you, we remain,

Yours truly,

PABST BREWING COMPANY,

CZ-M.

By C. Z.

I recall the receipt of letter dated October 29th, 1912, from plaintiff reading as follows:

San Francisco, Oct. 29th, 1912.

In reply refer to H-57158.

Pabst Brewing Co.,

Milwaukee, Wis.

Gentlemen:-

#### 1912 CROP HOP SALES.

Received your favor 23rd inst.

By special Delivery mail we send you to-day a line of samples #25 to 38 inclusive, equal to which we are ready to make deliveries to you.

We have just satisfactorily completed a 1500 bale delivery of 1912 Choice Hops to one of our Middle West clients. These 1500 bales were on the same line of samples as above sent you.

Faithfully,

E. CLEMENS HORST CO.,

ECH/J.

E. C. HORST,

I have been engaged in the brewing business since 1884. Of course from my experience and occupation I have acquired a general knowledge of the hop market conditions. I am familiar with the purchase of hops by samples. Each of the four samples forwarded by us to plaintiff were the part of a

sample. The other part was kept in our storage house in possession of Mr. Zaumeyer. The line of samples referred to in the letter of October 29th, exhibits 25 to 28, were received by the defendant. Basing my answer upon my knowledge and experience and understanding of the hop trade and business, it is not commercial usage to buy [269] or accept delivery of 2000 bales on one partial sample.

Q. You may state whether or not all of these samples 25 to 38 were choice.

A. There was one small sample in the lot that was choice. A very small sample. It would not be practicable to purchase or accept the delivery of 2000 bales of hops upon the submission of one partial sample, such as 25 to 28, because I do not think any man could pick up 2000 bales of hops, that would be identical with any one sample, , large or small. I do not recall ever having bought to exceed 75 of 100 bales on one sample. Because large variations are bound to occur in large deliveries. During the last ten years I have been president of the company I have been an actual member of the corporation and have been obliged to supervise the purchase hops. The custom with reference to sending a line of samples varies to a considerable degree. We purchase sometimes state hops, lots consisting of 10, 15, 20 bales, and we usually receive two or more samples covering the early and the late picking of these small lots. There is a general custom with respect to submission of one sample covering even smaller quantity than 50 to 100 bales. I remember sending lettergram

dated November 4th, 1912, to plaintiff. This telegram refers to samples 25 to 38, or for that matter to all of them. It covers the entire transaction, but that is the cancellation of the contract. I remember receipt of night lettergram dated November 5th, 1912. I do not think there were any letters, telegrams or otherwise, respecting the time of delivery other than what have been shown and testified to in this deposition.

I remember sending day letter November 7th, 1912, to plaintiff. Because of the failure of plaintiff to deliver hops of the agreed quality we were compelled to purchase hops elsewhere, because the season was getting later, and from the market reports as we [270] were getting them, the prices were going up above the price contracted for with the Horst Company for the 2000 bales. I do not see any reason why 2000 bales of Cosumnes hops could not have been in market if they were choice. The fact of the matter is I think choice hops can be marketed easily any time prior to the month of December and January, because as a rule the heavy buying takes place at and shortly after the opening of the season, and as the time goes on the choice hops become scarcer. I cancelled the contract because we had not been able to receive samples which were satisfactory, and because the price of hops was increasing, was going up, and we had to cover our requirements. At that time even the choice hops were not very plentiful on the market.

Q. Did Mr. Zaumeyer, to whom you have referred

in your testimony, report to you his findings in respect of the various samples submitted by E. Clemens Horst?

Objected to as hearsay testimony. Objection sustained, and exception.

- Q. You may state whether or not it was his duty to make report to you as the president of the corporation upon the inspection of such samples? Same objection, ruling and exception.
- Q. What did he report? Same objection, same ruling and same exception.
- Q. What report, if any, did he make in respect of the quality of the last samples sent, 25 to 38, the four samples you sent to Horst?
- Q. What was your understanding, if any you had, at the time the E. Clemens Horst Company asked you to send samples of such Cosumnes hops as you would accept?

Mr. FOSTER.—I object to what his understanding was as incompetent and immaterial. Objection sustained and exception. [271]

I am not certain whether I had any conversation with E. Clemens Horst in respect to the 2,000 bales of hops upon which this suit is based prior to the communications about it.

Q. When those samples 1 to 20 were sent, why did you think they were sent?

Objection, immaterial and incompetent: Same exception.

Q. You may state whether or not you relied upon the conduct of the plaintiff in sending the samples

referred to as evidencing its acquiescence in the demands of the so-called triplicate purchase order, No. 54,808.

Objected to as incompetent and immaterial. Objection sustained. Exception.

In a general way I remember Mr. George on the part of plaintiff was up here and speaking about our rejections and the cancellation of the contract. I think it was after the cancellation because his object was to have us withdraw the cancellation. I remember having a conversation with Mr. Gerber connected with plaintiff over the long distance telephone in connection with this dispute. Samples 25 to 38, with the exception of one small sample were not of the same high quality as the four samples which were sent to Horst at their request. We were convinced after the attempts made by Mr. Horst to comply with the terms of the contract in sending us samples which he did, and which were not acceptible, that he either could not or would not deliver such hops as were specified, and, as the market price of hops was on the incline, and we had to have large quantities of hops, we had to buy in the open market, and in order not to overstock, of course had to cancel the contract with Horst.

Cross-examination by Mr. FOSTER.

My entire experience in buying hops has been more of a supervisory nature than one of actual purchase, and that covered [272] California, and state hops, Wisconsin hops and imported hops. I do not think we have used any large quantities of Cosumnes hops

in our brewery. I could not estimate how many bales we had used. We brought some of the 1911 crop from Mr. Horst. We generally buy a special kind of California hops. We bought Sonomas, Russian Rivesr. I do not think there would be any difference between the better grade of the Sacramento hops and the same quality of Yakimas. The same would be true of Oregon. One must make it his business to be absolutely certain in making a distinction and being able to pick the various kinds of varieties. You may have a thin California hop with very little lupulin, and you might find a heavy hop with a large quantity. You may find the same condition in New York state. The New York hops generally sell better than the Pacific Coast. Sometimes there is a difference of  $25\phi$  and sometimes more. Whether they are better for brewing purposes depends entirely upon what the brewer want to produce. There have been many discussions as to the quality of the various hops which are grown. We have grown a hop here that we considered in point of results equal to any imported hop we have been able to buy, and the fact of the matter is that it cost us just as much to raise it as we could buy imported hops for. We are not in the hop business, except as buyers. We sell at infrequent intervals. We usually buy our requirements here. I was quite willing to sell a portion of this 2,000 bales Cosumnes. I do not know whether I talked with Mr. Horst upon the subject or not. I know there was some correspondence on the subject. I do not remember whether I made any proposition to Mr. George

about the price for which we would sell the Cosumnes hops. I presume from the reference to letter of September 28th, there must have been talk about me selling, with him. I do not think we offered to sell. On October 15th, we wired Mr. Horst that we must see [273] the samples Cosumnes delivered equal to four samples because we expected to dispose of the same on coast, but we did not necessarily mean, we expected to sell a part. We intended in the first instance to sell some of them, but we are not in the business of buying and selling hops. We were convinced that the price at which we were buying them was very low, 20 cents a pound. We expected either to make a profit on them by either disposing of them or having enough to carry us over, that is, carry us over into the following year, but we considered the price of 20 cents a very low price at the time. I do not recall that Mr. Horst has showed us he could sell them for 25 cents, but I am inclined to think not. I would not deny or affirm that I fixed the price at 27 cents, but I do not remember. I would not say. It is quite possible that I would not put it that way. I do not remember. When you show me telegram from E. Clemens Horst, dated September, 1912, saving, "we cannot accept your offer to repurchase thousand bales Cosumnes hops at 22 cents as we are selling below that figure Please wire," it does refresh my memory. I have had so many interviews at different times with various people on this and on other hop situations and matters that I would not say. I can refresh my memory from this. I think Mr.

Zaumeyer made some attempt to dispose of a portion of the hops, but he did not go out for that purpose. He went out for some other matters and incidentally he may have had some conversation with some people upon the prospects of this sale. I have some recollection of it but not as to date, or just when these offers were made or when these various conversations were had.

I have no recollection independent of letters when the first samples were received. There was a large crop of California hops in the year 1912. The 1911 crop was very much higher, but [274] I cannot remember a very rapid decline of the 1911 crop. I do not think the market since November 1st, 1912, and February 1st, 1913, dropped at all for choice Cosumnes hops. I never heard of any fifteen-cent offer being made any where for choice Cosumnes hops. I did not know that a large amount of the 1912 crop was carried over to the 1913 season. I did not know that the 1913 crop in the spring of 1913 sold for about twelve cents, and I do not think it was so. They sold better than that. We had no offers from any one at that low figure. We had a search made in our office for a letter pending our previous order. All the mail that comes into the brewery does not come to me personally but it is brought up by our own carried and given to one of our clerks, who opens all the mail and distributes the letters to the various departments, wherever they may belong, such as the purchasing department, sales department, architect department, engineers department. Each depart-

ment has its own separate file in the mail. Some of the departments have files where they temporarily keep things, but all the other departments except the advertising department files their letters permanently in one file. Our man who has charge of that would know the detail exactly, how the letters are received and filed. We had a request to get together all the correspondence concerning this contract and we did it. We made a diligent search. I did not make it personally, but gave the order that the search be made. The same as you do when you tell your office boy you want a letter, you do not absolutely go after it, you send somebody after it. I told them to make the search. I happened to see some of it made myself by Mr. Zaumeyer looking through his files in his desk, and I happened to come into the vault one day when some of the old files were being gone through, looking for correspondence on the subject, I was there when some of our employees were making the search. That happened at different times as the matter became of deeper interest. [275] We looked for one letter and then we looked for another and finally we looked over all the files, in that way, so far as I know, and I can testify that to the best of my knowledge and belief there is not any more correspondence on the subject than what we have produced in our files. All the letters that come to the brewery are preserved, except advertising and things like that. We make an attempt to keep every letter that is received and we make an attempt to keep copies of the letters that we send out. We have em-

ployees who have been with us for many years and we have right and reason to trust their statements.

Referring to the telegram dated August 22d, 1911, I would not say that I remember that particular telegram, but I remember it was part of a discussion I had with Mr. Zaumeyer. I am not going to testify that I found any of these telegrams or letters. I would not attempt to pick out any specific letters or telegrams my people in their search found.

Q. Will you point out to me any specific letter that your people in this search found?

A. No, I would not attempt to do it. I know that the original of some of these letters were found in our files. I would not say all of them.

Q. Isn't it a fact that your people did not find a whole lot of these letters that you are now willing to stipulate in your search were made by you, that you failed to find copies of many of them?

A. Not to my knowledge. I only understand in a round about way some of the letters were not produced.

Q. Take this letter dated March 16th, 1913, letter from E. Clemens Horst Company to the Pabst Brewing Company. Was that letter found in your files?

A. I would not be surprised. I remember several requests from Mr. Horst to answer his correspondence after we had told him [276] that we had no further comments to make on the situation.

I did not find any letters personally, as I stated before, and I did not send any letters or correspondence to our counsel in California.

My refusal is simply based on the fact that I made no personal search and I cannot tell by these copies which letters were found in our files and which were not found in our files and that is a perfectly sane statement to make and a perfectly proper statement.

Q. Referring to letter of October, 10th, 1912, "Pabst Brewing Company by CZ to E. Clemens Horst Company, San Francisco, California: Gentlemen, in reply to your telegram of to-day we beg to state that we have forwarded you four samples of choice Cosumnes hops. Kindly compare these with your samples and oblige," in your search that you made or had made, did you find that letter?

A. I refuse to answer other than the answer which I have given, that I found none of these letters myself.

Q. And you don't know as a matter of fact whether any of these letters that related to the 2,000 bale transaction between yourself and the Horst Company were actually found in your files or not, do you?

A. I do, because I have seen the originals.

I do not remember any specific or particular letter, but I do know that search was made and a great number of them were found, because I had them in my own hands and read them and they were taken out of our files. I would be compelled to give the same answer to the letter of March 1st, 1913, to the Pabst Brewing Company and signed by the E. Clemens Horst Company beginning "Gentlemen; received your favor of February 7th."

Q. That is, you do not know whether you got it or not? [277]

A. I did not say, I don't know. My answer there is very clear and concise on that incident.

The four samples that were sent out to the Horst people, 21 to 24 were Cosumnes hops. The only way I know was that I was told so. I could not tell from my examination whether they were Cosumnes hops or Russian Rivers. I personally saw the four samples. I was able to see that they were such hops as we were accustomed to buy, but I did not know whether they were Cosumnes hops or not. Our custom is to get one sample for every fifty to 100 bales. We occasionally get samples representing 10, 15 or 20 bales. As a rule we receive at least one sample for lot representing 50 to 100 bales.

Q. Then for four samples submitted to you, you would not expect to buy in excess of 400 bales?

A. That may depend upon whom we are dealing with and upon circumstances. There is no hard and set rule that one sample represents an equal number of bales. It is just a general custom to receive more than one sample for any quantity of hops that you buy. We would want 25 samples for the 2,000 bale order at least. I might want more. There is always some variation in almost every bale. It is very seldom that you draw samples out of the two bales that are supposed to come from the same consignment or shipment or from the same yard that are absolutely identical in every part of the same. They are apt to vary some, even in the bale at times. They might be choice. I cannot distinguish by examining samples whether hops are kiln-dried or air-dried. I can tell

if a hop is too dry and I can frequently detect by the odor whether a hop is over dry. The particular reason I objected to samples 1 to 20, was that a great many of the samples were broken, indicating possibly that they had been baled when they were too dry, and because they were not up to the choice quality. [278] They were not in color and lupulin. Some of them had sufficient lupulin, but not the right color. I rejected to them finally on the finding of Mr. Zaumeyer, in fact altogether. I cannot leave him out because he is a factor in the matter. I go by Mr. Zaumever's judgment because that is what he is employed for, because he is an expert in that line. I inspected them myself. We had been an hour or an hour and a half in discussing the conditions with Mr. Zaumeyer. Part of the time we were out looking at samples, comparing samples and discussing the situation. I do not remember discussing the hop market. The discussion was almost entirely on the quality of hops. We discussed the contract, because the contract called for choice hops. I had seen some other 1912 coast hops, but I do not know whether they were Cosumnes or not. The fact of the matter is that I inspect or look at very few samples that are submitted because Mr. Zaumever attends to that alto gether. When he accepts samples, I frequently look at them and when I reject samples as a rule I look at them. I tested the flavor of most of these samples. I do not say that I tested each and every one. I am not in a position to qualify as an expert, and I am not relying on my judgment in the matter entirely.

The fact of the matter is my own judgment plays a minor part in the acceptance or the rejection of any samples submitted. Later I inspected in the same way samples 25 to 38. They were called to my attention by Mr. Zaumeyer, and I looked them over, yes, I tested some of them, most of them and found the flavor lacking in some of them. I cannot detail at this time the different findings of each and every sample for some of them may have been good in some respects and bad in other respects. Some of them lacked in luster, color and life. A choice hop is one that has good qualities, good flavor, good in color and good quality and [279] quantity of lupulin. I would not consider any hop a choice hop that was lacking any one of those qualities. I do not mean to say that the color may be green or yellow, but when a hop has a dead color and is otherwise sound, I would not call that a choice hop. I would not take it upon myself to testify or to qualify or make any distinction. If I had to accept a hop as choice I would not lay so much stress on color as I would on lupulin, quality and quantity of flavor. The flavor, lupulin and quality are the important things. You could not have a choice hop unless the three were present and all cleanly picked. I do not mean to say I can always distinguish, but I would not rely upon my judgment to allow myself to always distinguish all these as necessary parts. I do not believe that a hop lacking what is considered good color, the right kind of color, and having all the other necessary qualifications, would be called a choice hop. I have always

accepted Mr. Zaumeyer's judgment on the quality of hops. In an order of 2,000 bales there would not be any variation so far as flavor and lupulin is concerned, and they must be clean-picked, but there may be a variation in color, because no rejection can be made of a choice hop, if it is sound in every way, and if it was green or yellow, because some people prefer a green hop and some people prefer a vellow hop, and the variation naturally would be in the color of the hop, ranging between greenish and yellowish, as to the time that it was picked. But if it is mixed with a lot of leaves and stems, of course that would disqualify it from being choice. It is not a custom of the hop trade to consider as choice hops that were not choice because previously all the choice hops had been exhausted. I cannot conceive of an article being changed simply because the better article is gone. Choice would not vary from year to year owing to conditions. It would not be the best of [280] any year's crop. I do not believe that the standard of a hop has to vary from year to year.  $\Lambda$ hop that is choice must always have standard qualities of flavor, cleanly picked, soundness and brightness of color. It would apply to all kinds of hops, New York, Cosumnes and California. We did not give the Horst people an opportunity to present further samples because we had already purchased other hops, and cancelled our contract. It was too late to consider any further samples from them. It looks to me that the more inferior the quality acceptable to us, the cheaper they could buy it, and the more money

they could make on it. The statement made in one of the letters by Mr. Horst was that they were sending us samples of hops that they had and they were willing to buy others.

Q. Your contract called for 2,000 bales of Cosumnes hops, and in order to fill that contract, all of the hops delivered would have to be Cosumnes hops? Would they not?

A. The last phase of the situation came down to a question of submitting samples and buying and accepting according to sample and not according to contract. Horst signified his willingness according to samples submitted by us. I don't know whether if they had tendered us the best 2,000 bales of 1912 Cosumnes hops it would have been a complete performance of our contract, because I am not in a position to say what the best 1912 crop was. I did see the samples which I was informed represented Cosumnes hops and it was satisfactory to me. Samples 21 to 24, and if the 2000 bales had been equal to the four samples which had bee sent them we should have accepted them. I do not know what the very best Cosumnes hops looked like, because I may not have seen them, but because I did see what purported to be Cosumnes hops and on the basis of the samples which I did see, I was [281] willing to accept delivery, and Mr. Horst never indicated that he could not send us hops that were equal to the samples, or said that the hops were not raised in the Cosumnes that year that were equal or not equal to those samples. Whether brewers contract for hops during the win-

ter months before November 1st, or any year, depends upon the condition of the crop and the purse of the brewer and various other conditions. Some people buy from hand to mouth; some people lay in a big store, sometimes people lay in a two years' supply, or in excess of one year's supply when hops are cheap, &c. &c.

Big brewers sometimes start buying when the season opens up and probably buy in lots of 100 or 200 or 300 or 500, from various dealers, until they have their full supply. It happens occasionally that the business increases or is very much better than anticipated, and I have known people to buy hops sometimes late in the season, not from choice but from necessity. I do not believe that brewers have bought practically all the hops they needed in 1912, prior to November 1st, 1912. I have no knowledge but the chances are they did not because the hop season runs way into December, January and February. That is the usual condition. There are peaks in the brewing trade. We have to purchase our summer supply and that is our high peak. That begins along in January and December. We begin to brew hops in December and keep it up to July and August, then we drop down again. During the winter of 1912 and 1913 we were using the 1912 crop, and we would be doing that until the new crop of 1913 came in. We usually begin in September. We cannot take in all of our hops any more than we can all of our barley in one month or in two months. We have to distribute it over a period, because we are not

in a position to handle more than a given quantity. We have a special hop storage hop house that is kept at certain temperature. [282] We can store about three or four thousand bales. I do not think we bought any Cosumnes hops in 1912, outside of the Horst Company hops but we did buy Sacramento. About 250 bales under a contract we had made some time previous. I have a recollection of sample #36. I was told later on that it was a part of one of the identical samples. Not from Mr. Zaumeyer but from another source. In my opinion all the samples 25 to 38, exclusive of 36, the small sample, were distinctly inferior to 2t to 24, but as I say I do not rely upon my opinion and my judgment of them. I have no recollection of ever having received letter dated August 31st, 1912, apparently signed E. Clemens Horst Company. I was not prepared to swear that I have never received it, but I have no recollection either way. The substance of the letter does not refresh my memory.

Cross-examination and Direct Examination by Mr. SPOONER.

In the months of November and December, 1912, we purchased hops, due to the alleged failure of the plaintiff to deliver us hops as required by the agreement. We bought hops in November and December, 1912, from P. A. Livesly & Company and C. C. Sweeney & Company. I refresh my memory from the original papers received from them. The papers shown me are accounts received by Pabst Brewing Company at the dates each of them bore date.

These statements were received by Pabst Brewing Company. I remember the receipt of the statements. I know the facts in the matter and I refer to the papers only as to the quantity which was purchased. I know we bought from both Sweeney and Livesly, during the months of November, 1912. This is very fresh and very vivid in my memory. I also recognize the checks and youchers of the Pabst Brewing Company given to pay these bills. The check of the Chemical National Bank of New York, dated January [283] 29th, 1913, serial number 62,980, signed by the Pabst Brewing Company was in payment of the bales of hops purchased from them, C. C. Sweeney & Co. Check for \$12,316.89 to C. C. Sweeney & Co. was in payment of these bills. I also recognize the statement of accounts of T. A. Livesly & Company. They are the bills received by us from T. A. Livesly & Company for the purchaseof hops in November and December. The hops therein referred to were received by us and that the a correct statement of the account and price. I also identified check Pabst Brewing dated January 29th, 1913, in payment of the bills received from Livesly, marked BB and CC. The bills correctly state the amount and price of the hops therein referred to and the same were delivered to us in the due course of business and I recognize the bill of C. C. Sweeney & Company, dated November 21st, and check in payment of the bills. These hops were received and paid for as specified, and the check was paid. The bills and checks correctly state the

(Deposition of Gustav Pabst.)
amount and price, and to my knowledge the hops
therein specified were received as specified.

The prices therein stated were correctly stated, and the amounts stated in the checks were actually paid to the payees therein named. We purchased these hops because we required them. We had to have them in our business and to replace the hops which under the contract with E. Clemens Horst Company failed to deliver to us.

The hops purchased by us were as follows:
From T. A. Livesly & Co. on Nov. 25, 1912.
100 bales containing net 19,332 lbs. at $21\phi$
per lb., deliveredTotal 4,059.72
Less freight 297.50
Net 3,762.22
[284]
On Dec. 24th, 1912, 80 bales of hops
containing 16,496 lbs. at $23\phi$ per
1b. delivered Total, 3,794.08
Less freight 292.26
Net 3,501.82
On Nov. 25, 1912, 156 bales hops
containing 31,083 lbs. at $23\phi$ per
1b. delivered Total, \$7,149.09
Less freight 487.50
Net\$6,661.59

(Deposition of Gustav Pabst.)
On Nov. 25, 1912, 100 bales hops
containing 19,441 lbs. $@22\phi$ per
75. delivered Total, 4,277.02
Less freight
Net 3,975.52
From C. C. Sweeney & Co., on
Nov. 14, 1912, 93 bales hops con-
taining 16,837 lbs. at $22\phi$ per
1b. delivered Total, \$3,704.14
Less freight
Net \$3,444.61
From C. C. Sweeney & Co., on
Nov. 13, 1912, 89 bales hops con-
taining 16,988 net at $22\phi$ per
1b delivered Total, \$3,737.36
Less freight
Net
On Nov. 21, 1912, 250 bales hops
containing 47,385 fbs. $@$ $22\phi$
per lb. deliveredTotal, \$10,424.70
Less freight
Net\$9,683.45
Check Pabst Brewing Company, Milwaukee, Jan
29, 1913, #62980. Pay to the Order of C. C. Swee-
ney & Co\$9683 45/100
,

Ninety six hundred eighty three and 45/100 Dollars. To Chemical National Bank.

New York.

### PABST BREWING COMPANY.

By I. M. EWING.

Check #62981, \$10163.41. Payable to C. C. Sweeney & Co.

Check #62861, \$12,316.89, payable to C. C. Sweeney & Co.

Hops purchased from C. C. Sweeney & Co., on Nov. 15, 1912. 150 bales hops containing 26379 lb. @ 22¢ per lb. delivered.

......Total, 5,803.38

Less freight...... 406.93

Net...... 5,396.45

Check #62,862, for \$7,737.74, payable to C. C. Sweeney & Co.

Q. Did you have understanding as to reason E. Clemens Horst Company, the plaintiff herein, sent samples as stated in his letter of September 28th, 1912, which were samples 1 to 20 inclusive? [285]

Objected to as immaterial and incompetent.

Objection sustained and exception.

Q. You may state whether the receipt of the samples one to twenty had any influence upon the conduct of the business of the Pabst Brewing Company.

Objected to as incompetent and immaterial.

Objection sustained and exception.

Q. Did it lead the Pabst Brewing Co., or did it not lead the Pabst Brewing Company to rely upon the acquiescence of the E. Clemens Horst Company in the compliance with the purchase order respecting the delivery of samples?

Same objection, same ruling and same exception.

Cross-examination by Mr. FOSTER.

These bills were taken out of our files. They have been checked over by our people who do these things and have charge of the various matters, and the checks have been made out in the regular routine, and are genuine, and are in payment of these bills, being the same as the checks, and the checks denote that they were cashed and cancelled and the money received therefor by the payees who sold us the hops. They are made out on the dates that would correspond with the dates of the bills, going through the regular routine of receiving the hops and inspecting them. I have no knowledge of the number of bales, except what the bales show. I refer always, in matters of that kind, to either our books or such accurate records we keep of all our transactions. The purchase made in November was for delivery in December.

I am not sure that any purchases were made from Sweeney & Co. and Livesly & Co., other than the bills show here in November and December. Our books give the exact date, the exact number of sales, and exactly what was paid for every pound [286]

Q. How do you know but that some of these checks here were given in payment of other purchases

of hops from Sweeney and Livesly & Company, if you do not know whether or not you did buy others?

A. Because it would be a very strange coincidence, with the bills presented here, and the checks presented here, marked exhibits from "AA" to "LL" inclusive, should tally as to the amounts and as to the time, about, when payments would naturally be made. If you will kindly look over these bills you will see that two or three bills at different times have been footed, the amounts have been footed, and these various amounts taken from the bills and the total amount tallying with the amount of the check. In some instances the checks are made payable in the payment of a single bill, I believe, and in other instances there are several bills added together. Now, if you will kindly let me look that over I will answer your question.

- Q. You are seeking to recover damages against the Horst people here for a breach of an alleged contract that you claim was made with them to deliver to you two thousand bales of hops, are you not?
  - A. I don't know of any such action.
- Q. You are not familiar with that? What are you trying to recover damages for?
- A. I say I don't know that any such action is pending.
- Q. You are familiar with the issues in the case, so you testified?
- A. I am familiar with that part of it which refers to an attempt on the part of the E. C. Horst Company to recover damages from us for the so-called,

(Deposition of Gustav Pabst.) as you term it, alleged contract.

Q. You knew that your counsel had filed what is known in law as a counterclaim in this case? [287]

A. I didn't know that a counterclaim had been filed.

Q. What did you think was the purpose of your counsel here in introducing this morning these so-called Sweeney bills and Livesly bills, and checks connected therewith?

A. I suppose counsel could answer that better than I.

Q. You are not, then, trying to prove up any damages against Horst & Company?

Mr. SPOONER.—I object to that as a matter to be determined from the pleadings and not from the statement of the witness.

A. I am not conducting this case. I am simply a witness and I am answering such questions as are put to me by counsel. I do not propose to intend to pay any particular construction or motive on his questions.

Q. Was it due to any alleged failure on the part of the Horst Company to deliver to you two thousand bales of hops under the contract that was made between you in 1911 of the 1912 crop that you went into the market or somewhere else and bought hops from Sweeney and Livesly?

A. I testified yesterday that because of the failure to deliver to us under contract, and because of the fact that we could not wait any longer to lay in our neccessary supplies and stock, we went out into the

open market and bought hops for our use, because of the failure of E. Clemens Horst Company to deliver under contract.

- Q. When you sent out samples 21 to 24 to the Horst people, which samples I now show you, marked Defendant's Exhibits 21 to 24, you were willing to accept from the Horst Company 2000 bales of hops equal to any one of those samples? A. Yes, sir.
- Q. And consequently when you received back from the Horst people samples marked 25 to 38 inclusive, you examined those samples and [288] found that one of those samples, as I understand, was equal in quality to 21 to 24, which you had sent out?
  - A. Is that my testimony of Mr. Zaumeyer?
- Q. Well, isn't that a fact, without regard to your testimony?
- A. That is the fact. It has been reported to me by Mr. Zaumeyer.
  - Q. Well, you examined them, too, at the time?
  - A. I looked at them.
  - Q. And it is your opinion that one was equal?
- A. I believe that I said either that I found from my own judgment one to be like it or similar to it, or that it had been said to me, or that I had been informed, that was the case.
- Q. Well, I didn't you look at it enough yourself to have any idea as to whether or not it was equal to it?
- A. I don't know that I could answer that question right now.
  - Q. Will you kindly look at these samples, Colonel

Pabst, and tell me, if you can, indicate any one of them that is equal to any one of these four.

- A. I cannot qualify and my judgment would probably be satisfactory only to myself, and not work anything as conclusive and proper evidence.
- Q. I ask that the witness examine these samples and give us his opinion on them whether or not any of the three samples submitted here are equal in quality to samples 21 to 24. Will you do so?

A. No, I will not do so—because I do not care—Mr. SPOONER.—Go on, do it.

The WITNESS.—Well, I don't know. What is the use?

Mr. SPOONER.—Well, then, when you examine it say you don't know.

Mr. FOSTER.—Q. Here are three samples and here are four samples. These four samples down below are the four samples, 21 to 24, forwarded [289] by you to the Horst people. These three samples up here are the three samples that were returned by the Horst people to you, being three of the samples numbered from 25 to 38 inclusive, three out of those.

Now, will you please examine the three and advise us which one of the three is equal in quality to the four?

A. I am not able to state.

I have not sufficient familiarity with the hops to determine that.

I would not be able to tell which of the three Horst samples is the choicer hop.

My knowledge of the hop business is not sufficient to allow myself to make a statement that would be considered by those who make the hop industry their business of any value.

I do not assume to distinguish between a prime hop and a choice hop, from the inspection of the sample. Nor whether that particular sample was air-dried or kiln-dried.

I can tell stems from burrs, of course; I should see a hop full of stems, I would naturally say it was not cleanly picked. It does not need an expert to do that.

I cannot answer whether the sample shown me would be considered a choice hop or whether I would judge it as being dirty. I would not trust to my own judgment as to rejecting it. Referring to sample #35.

I have not qualified to make any statement regarding the question you asked me, whether these hops are prime or choice or whether I would reject them because of their being dirtily picked, or any other qualification which they may have.

I would not trust to my own judgment in a matter of that kind. I have never intended or passed as one who can determine to make a settlement as to quality of hops. [290]

It is not a question of picking alone. There are other qualifications that naturally must enter into a hop to make them a certain quality.

I do not know the percentage of leaves that is re-

(Deposition of Gustav Pabst.)
quired to make a hop objectionable, as to a certain grade.

I cannot pass upon samples to determine whether or not there is lupulin enough in them.

The evidence refers to sample #37.

Referring to the two documents dated September 8th, 1911, one of which is purchase order #54,808, and the other of which does not seem to have that written on it, I cannot account for their being two documents. I suppose we made them in triplicate. One we kept and two we sent for the signature. I do not remember whether one was ever returned signed by the Horst people. According to our usual custom, we send out two to have one sent back.

All the shipments concerning which I have testified as being represented by exhibits "AA" to "LL" were made, less freight, or subject to reduction of freight to Milwaukee.

About 180 pounds would be the average weight of a bale of hops.

Because of the failure of the plaintiff to deliver us under the contract and because of the fact that we could not wait any longer to lay in our necessary supplies we went into the open market and bought hops for our use. The contract for the purchase of 1912, as evidenced by our purchase order No. 54,-808 to plaintiff and the correspondence relating thereto. It subsequently states that shipment must reach us during October, November, December, January or February. One of the sales from Sweeney was made for 332 bales on November 4th and the

price was 22¢, less freight Milwaukee. It was made from a sample. It is the same Mr. Sweeney who furnished us samples 21 to 24. I do not know where [291] the goods in this 332 bales were grown, except that they were grown on the Pacific Coast. These hops were not bought for speculation. We are but in the business of buying hops for speculation. I did not buy the Horst crop 1912 to resell, but I said I would consider the matter of resale, or a part of them possibly, even when we bought them. I might have had some probably undeveloped and not clearly defined thought in my mind. I considered the purchase at that time, at the price, a very good buy, and I think so to-day and it was a good. I do not remember that I made an attempt to sell 1000 bales of this order on the coast.

Referring to telegram of October 15th, I do not remember whether we made an offer or whether we had an offer. I do not recall anything about it. As late as the middle of October, we were relying upon Horst 1912 Cosumnes for running out brewery during the winter of 1913. The hops bought from Sweeney were choice hops. All of the hops purchased were choice hops. My recollection is that I saw the various samples upon which these hops were bought, but I am not positive. They were all Pacific Coast hops, but I do not know from what section of the coast they came. One of the purchases represented a grade not as good as the choice hop that we had been buying, and this was the only thing that was left in the market. I have no recollection

as to which took place first, the cancellation of the contract on November 4th, or the purchase from Sweeney on the same date. I cannot recall the hour of the day on which we sent the telegram dated November 4th, 1912. I instigated the sending of the telegram, I may have dictated it or I may have told Mr. Zaumeyer to send it. When I sent out samples 21 to 24 to the Horst people, I was willing to accept from them 2000 bales of hops equal to those samples. [292]

# [Testimony of Charles Zaumeyer, for Defendant.]

CHARLES ZAUMEYER, recalled for cross-examination.

Mr. Sweeney first came to see me to sell hops in November, 1912, not before the 4th, about the fourth. He brought some samples with him. I think it was the same day we cancelled the Horst contract. We bought 352 bales that day. I think it was in the afternoon. I do not recall whether it was before or after the telegram was sent to Horst or whether I sent Horst the telegram or Mr. Pabst. Sweeney would come to see us very often—every time be came to Milwaukee. I do not remember to have been at the brewery more than once in November and I do not remember what he said about Cosummes hops at that time. He did not tell me that he had seen the Horst crop. He said nothing at all about the Horst hops nor about Cosumnes hops. He did not offer us any hops before November 4th. asked him on November 4th, if he had any choice hops. He said he had and we did not care whether

they were Cosumnes or not so long as they were choice. We got the samples to send to Mr. Horst early in October from Mr. Sweeney. Mr. Pabst asked him if he had any choice hops and he said the next time he went to Chicago he would look and see, and the next time he came he submitted us these four samples, and I asked him if they were the best he had and whether they were Cosumnes hops, and he said they were. I, myself, did not know whether they were Cosumnes. These hops are from prime to choice. He did not say they were choice, he said they were the best he had. I did not ask him if they were the best that could be obtained. The brewery uses 3500 to 3800 bales of domestic hops each year. If we had the right quality, we could use 2000 bales of Cosumnes hops, one-half. We use Bohemia hops in our beer and very little New York hops, and sometimes Washington hops. We take about half domestic and half imported hops, making a blend of them. Colonel Pabst [293] and myself buy all the hops. We have seen good hops from every section of California. We do not use Oregon hops. If the brew master wants Oregon hops we buy them. An Oregon hop is more sightly than a California hop. It is a different character of a hop. Washington hops and California hops are about the same. They are no higher in the market. I do not know that Yakimas are the highest Pacific Coast hops. I did not make up my mind to sell any of the hops we bought from Horst. We did not try to sell them. I had no intention of selling them. Mr. Pabst never

said anything to me about his intention of selling them. I never talked to Mr. Livesly of Oregon about selling them. I never made any endeavor to get a price on them. I had no right to sell anything without Colonel Pabst's consent. I did not know that Colonel Pabst was willing to sell if he got a fair price. If anybody had made us the right price we might have sold, but nobody made us a good proposition. I can tell Cosumnes hops from Oregon hops and from New York hops, within a certain period of time after they are harvested. I cannot distinguish one district of California from another. I asked Mr. Horst what he would sell a portion of his contract for when I was on a visit to his ranch in 1912. He said he was a seller and not a buyer. I was just feeling how strong the market was going to get. It did not make any difference, I just did it for a feeler. It is not a habit of mine, but I have a right to do it. I had no intention of selling them. I could not sell them to him if he offered me \$1.00 a pound. I had no right to sell them. I wanted to see how strong the market was going to be. There was no market at that time. This was before the season in July. If Mr. Horst had made me a fair proposition I would have taken it up with Mr. Pabst and see what he wanted to do about it. I should judge the price at that time [294] was about 23 or 24 cents. They did not drop from that price. I am not familiar with choice hops or prime hops. They run below our grade. The Sweeney hops ranged in price from 22 to 23 cents. Choice hops

kept that price all during the year. Hops like the Sweeney hops never drop. They were prime to choice. When I made out orders for the purchase of hops, I make them in triplicate. The duplicate goes out. The triplicate is kept with mine for my own office. We bought some 1911 hops from Horst, They were good hops, satisfactory in every way, all but dirty picking.

- Q. If 1912 hops had been as good as 1911 hops, would you have accepted them?
  - A. No, sir, because they were inferior grade.
- Q. Why did you accept the 1911 hops when you would not accept *there*?

A. Because the samples submitted us were very much better than any of these samples submitted here. The 1911 hops had qualifications of choice, hops, with the exception of the dirty picking, which we allowed to go in.

Q. Why did you accept the 1911 hops, then?

A. We were very short of hops, and after inspecting them I found they were dirty pick and I took the matter up with Colonel Pabst, and he said, "Let it slip through." When we are short of hops we need hops. I would have rejected them in 1911. It was my intention to reject them, but Colonel Pabst being ahead of me, on his wish I accepted them. I have seen a perfect hop commercially in Milwaukee. The Saazer hop. That is an imported hop. I have seen the fancy United States hop. It is better than choice. They are practically perfect. Not entirely free of leaves, but contains a very small

amount of leaves. A choice hop is a hop of sound quality picked properly, cured properly, uniform in color, well filled with lupulin and of fine flavor. There is no variation. They must be uniform in color. A hop of a season's pick comes up to a certain [295] standard and a choice hop is always absolutely up to the same standard. A choice hop has got to be a choice hop at any time of the year, and is the same in California as in any other State. I consider the same thing in reference to Mr. Horst's pick. I claim that what Mr. Horst calls a choice hop has a dirty pick.

Redirect Examination by Mr. POWERS.

The qualifications of the 1911 crop were good flavor, properly cured and they were well filled with lupulin. The only thing that was lacking was the clean picking. A choice California hop would be the same as a choice Yakima. If you compare a prime Washington with a choice Yakima why the prime Washington would be under grade. If I had 2000 bales of choice air-dried Cosumnes hops, I could have kept them over 1912, to use in the following season, if we did not use them all. We generally carry over 500 or 600 bales into the next season. When I examined these samples in the courtroom to-day, I had to admit that these samples were small and were not in the proper light. We generally examine samples in the morning, because that is the best time to look at the sample. You have got to have bright light. These samples here are undersized from the usual samples.

Mr. POWERS.—We offer in evidence letter dated September 28th, 1912.

Letter dated September 28th, 1912, already in evidence, was then read.

Cross-examination—Mr. DEVLIN.

In our cold-storage room we do not have artificial light; we have regular light. We have electricity there, but not while we are inspecting samples. There are windows in the cold-storage rooms. [296]

Mr. ZAUMEYER, recalled by defendant.

With reference to the 1912 Cosumnes hops that were offered to us, if they had been of the same character so far as the hops themselves were concerned, as the 1911 hops were, and cleanly picked, we would have accepted them. Two thousand bales of hops is about the quantity we usually buy. It is a large order. We bought some Cosumnes hops in the year 1911 from Nebius Drescher & Co., about 250 bales, on a contract. Starting with the year 1911, we had to take those whether we bought the Horst hops or not. Sample 36 sent us was too small in the first place. Not a commercial sized sample. It was too small a sample. I did not examine it. Sample 25 was not a choice hop. Not as good as 24. The samples submitted by Mr. Horst varied. Some were better than others.

# [Testimony of G. S. Chalmers, for Defendant (Recalled).]

G. S. CHALMERS, recalled by defendant.

Direct Examination by Mr. BUTLER.

I do not know the name of the man who was in

(Deposition of G. S. Chalmers.)

charge of plaintiff's ranch, known as the Murphy ranch, with whom I had a conversation. He was in charge of the picking machine. All I know about the man is that he told me he was in charge. There must have been fifty men working there, and the particular person we had the conversation with was in charge of the picking machine. I asked for Mr. Conrad and he said he was on another ranch and that he had charge of the picking machine at the time. He also said he would show me around. We walked along looking at the machine and to where the hops were going out of the elevator into the kiln. I do not think I could identify the man at the present time if I saw him. He was a large man. It was my first time on the ranch. He was working actively. At times he was. He had a long stick there and at times he would hit on the machine, and he gave orders to some Hindoos around there. [297]

The COURT.—The witness will not be permitted to testify further unless you can show the man in authority.

Mr. BUTLER.—Where are your men, Mr. Devlin?

Mr. DEVLIN.—Right here.

Mr. BUTLER.—Do you recognize any of those men?

A. I know one man, that is all I know. There was one of the men there at the kiln, if I ain't mistaken. I cannot say whether the other men were at the picking machine or not. The man on the right, as near as I can remember. I cannot identify

(Deposition of G. S. Chalmers.)

the man who was there and with whom I had the conversation. Mr. Conrad was not there at the time. I could not say positively whether the other man was there or not. I could not say whether he was in charge or not. I took it for granted that he had something to do with it or he would not have taken that privilege.

Q. Will you now state, Mr. Chalmers, what conversation you had with this party that you met there apparently in charge of the hop-picking plant at that time?

Mr. DEVLIN.—I object to it unless he can show somebody in authority, irrelevant, incompetent and immaterial, vague, indefinite and uncertain. We have tried to bring in everybody in charge of the machine.

Mr. BUTLER.—Was there any other person on the premises at that time exercising any authority in the picking house that you saw?

A. I never seen any.

Mr. BUTLER.—State what conversation occurred:

The COURT.—Be careful, Mr. Chalmers, to confine yourself strictly to what you know. Do not draw upon your imagination.

A. I will just tell you what I seen, and that is all I know. I went through the picking machine where they were picking; I went along to where the picking machine was and I asked him why they were letting the leaves and stems go in there, and he said, we have got a cheap contract and we have orders to

(Deposition of G. S. Chalmers.) let [298] everything go in.

Q. What was the condition that you observed concerning the leaves and stems going in, that lead up to this conversation?

A. Well, the thing that throws the hops out was not working at all. It was standing still, and that is how we came to talk about it. Then we went along to the elevator that takes the hops up into the kiln.

The COURT.—The leaves and stems were ground up and sent to the kiln?

A. The picking machine strips them right off, and the leaves and stems were going up into the kiln. You could not see many hops. There were no leaves or stems being thrown out by the machine at all, that I saw. What we call the drum was standing still. It was not running. The vines are pulled right through lengthwise and no leaves and stems are stripped off the best they can. What did not pull off they had a man outside picking them off, and they left the rest on, and a little stems, leaves and so forth went in with the hops. The biggest stems were not sent up with the hops. They did not grind the vines up. The man said that they had orders to let everything go up in the kiln. That they had a cheap contract and the blower was stopped.

The COURT.—All of this will have to go out. The witness has shown that he does not know anything about it.

Mr. BUTLER.—How far is the hop ranch that you visited from your place, Mr. Chalmers?

(Deposition of G. S. Chalmers.)

- A. I should judge about eight miles. It may be a little further. It is higher.
- Q. Do you know about the relative time that hops usually ripen?

The COURT.—I cannot permit you to go into that.

Mr. BUTLER.—Exception. That is all.

A. I could not tell you who the man was I talked to. I had [299] never seen him before nor since. I could not say whether he was any of the gentlemen here in the courtroom. I will not say it was not. I was there two hours or two hours and a half. I went around from one building to another looking at the hops. That was the first time I had ever seen a picking machine. I had seen a lot of hop buildings before. I wanted to see how the hops were cured and the way the picking machine worked. I had never been on the ranch before. Mr. Traganza asked me to take a ride over and see the picking machine.

The COURT.—This evidence should not be permitted to stand. It is absolutely indefinite.

Mr. DEVLIN.—It is stricken out, your Honor.

The COURT.—Yes.

Mr. BUTLER.—Exception.

### Exception #

Mr. POWERS.—Your Honor has stricken out the conversation. How about the witness seeing the physical fact of the leaves going in?

The COURT.—I am striking out the whole of it. There is nothing to connect it with the plaintiff.

(Deposition of T. A. Farrell.)

Mr. POWERS.—Exception.

### Exception #

Mr. BUTLER.—We offer to prove by Mr. Traganza the same facts concerning the picking conditions that have been testified to by this witness.

The COURT.—I make the same ruling. Exception.

# Exception #

# [Testimony of T. A. Farrell, for Defendant (Recalled)].

T. A. FARRELL, recalled by defendant.

I have examined the entries in the sales book of the plaintiff on file here, and have checked up the sales of Cosumnes hops for the year 1912, and added up the number of bales that are shown in this book as having been sold on dates prior to November 4th, 1912. They amount to 2764 bales. [300]

# [Testimony of E. Clemens Horst, for Plaintiff (Recalled).]

E. CLEMENS HORST, recalled by plaintiff.

Mr. DEVLIN.—(Q.) In your testimony I asked you certain questions as to your ability to deliver 2,000 bales of hops equal to the samples 1 to 20. I now ask you if, on November 4th, 1912, you had 2,000 bales of hops on hand equal in quality to samples 21 to 24?

Mr. POWERS.—We object to that as not rebuttal. The COURT.—Objection overruled. Exception.

## Exception #

A. Yes.

Q. Were you ready and willing on that day to

(Deposition of E. Clemens Horst.)

deliver them if they had been accepted?

Mr. POWERS.—I object to all of this on the ground that it is irrelevant, incompetent and immaterial, and calling for the conclusion of the witness on a question of law.

The COURT.—Objection overruled and exception.

## Exception #

Q. On that date, if the defendant was willing to accept were you able, ready and willing to deliver the 2,000 bales of hops equal in quality to samples 21, 22, 23 and 24?

Mr. POWERS.—I object to that on the same ground.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

### Exception #

A. Yes.

Mr. POWERS.—Where was these hops?

A. They were in that 3042 bales, an account of which we have given to you.

Q. These same air-dried Cosumnes hops you have already testified to?

Mr. DEVLIN.—That is our case, your Honor.

The COURT.—That closes the evidence. [301]

During the argument Mr. Powers referred to the testimony of witness Chalmers with reference to the green condition on which plaintiff's hops were picked in 1912.

Thereupon Mr. Devlin interrupted as follows:
That testimony was stricken out. Counsel is now

(Deposition of E. Clemens Horst.)
referring to testimony that your Honor has stricken
out

Mr. POWERS.—Mr. Chalmers testified yesterday with reference to the fact that the hops were picked twenty days earlier. That has not been stricken out.

The COURT.—All of his testimony went out.

Mr. POWERS.—Including that about the picking?

The COURT.—Yes, it was wholly irrelevant. The question is: What was the quality of these hops when they were tendered to the defendant?

Mr. POWERS.—Exception.

After the completion of the arguments of counsel, the Court gave the following charge to the Jury, viz.:

### [Instructions of the Court to the Jury.]

The COURT. (Orally).—Gentlemen of the Jury, I ask your attention at this time for a few moments while I submit to you the principles of law that must govern you in your consideration of the evidence in this case for the purpose of arriving at a verdict. The action is one for the alleged breach of a contract for the sale of hops. While the cause has consumed some considerable period of time and has involved the taking of a large volume of evidence, I think that you will find when you come to consider it in the light of the instructions of the Court that it lies within rather narrow lines, and that you will have no difficulty in readily perceiving what the salient features of the case are that will call for your consideration. The Court will tell you what the

legal effect of [302] the correspondence between the parties is, and from that and the oral evidence that has been placed before you you will determine what the facts are which I shall indicate to you it is essential for you to find in order to reach a verdict; and with that view I shall now state to you the more specific principles that will actuate you in your consideration of the evidence.

The telegraphic offers by the plaintiff and their acceptance by the defendant in August, 1911, as shown by the evidence, constituted in law a valid and binding contract as of that date, whereby the plaintiff obligated itself to sell and deliver and the defendant to accept and pay for two thousand bales of choice, air-dried Cosumnes hops of the crop of 1912, at the price of twenty cents a pound delivered on board the cars at Milwaukee, Wisconsin, plus freight, that is, freight to be paid by defendant in addition to the purchase price named; and this contract was in no respect modified or changed by the subsequent correspondence or negotiations of the parties. While this contract did not, by its terms, require plaintiff to submit samples of hops prior to delivery, the evidence shows without conflict that the parties by their acts so construed it, and it thereby became one of the terms of the contract by which they were bound.

Under this contract, therefore, it was the duty of the plaintiff within a reasonable time after the harvesting of the crop of 1912 to submit to the defendant samples of hops of the quality specified in the contract and hold himself ready to deliver the quantity called for by the contract in due course; and it was the reciprocal duty of the defendant upon receipt of such samples, if of the quality specified, to accept delivery of the quantity named in the contract and pay for them in accordance with its terms.

The evidence shows without controversy that plaintiff did in due time upon the harvesting of the crop of 1912 submit to the [303] defendant samples of hops of that season's growth which he claimed and still claims represented hops of the character in all respects as called for by the contract, and represented himself as ready to deliver the quantity therein specified to the defendant. The samples thus submitted were each and all rejected by the defendant as not representing the quality which it was entitled to demand under the contract, and thereafter, on November 4, 1912, defendant notified plaintiff by a telegram that it cancelled the contract, and refused to accept delivery of the hops tendered by plaintiff as not being of the grade or quality called for.

The first question, therefore, which you are called upon to determine in reaching a verdict is whether the samples thus submitted by plaintiff were of hops of the quality specified in the contract, since this is a question for the jury to determine and not one for the final decision of the defendant. If they were of that quality, and plaintiff was ready and able to deliver the quantity called for in accordance with the terms of the contract, the defendant could not arbitrarily repudiate the contract by claiming that the samples were not in accordance with the quality

of hops stipulated. If, however, none of the samples submitted by plaintiff represented the character of hops called for by the contract, but were of an inferior grade, and plaintiff was unable to furnish samples of the required quality within the time given for delivery, then the defendant had a right to reject them and to say that it would not receive hops of that character. To be more specific, if of the first lot of samples shown to have been submitted by plaintiff to defendant there were some that answered to the contract quality, it was the duty of the defendant to accept such samples as represented the required quality and give the plaintiff an opportunity to make delivery of the hops contracted [304] for in accordance therewith; and in such case the defendant, by rejecting them all and refusing to receive the delivery, was in default and guilty of a breach of the contract. And although none of the twenty samples first submitted were of the contract quality, nevertheless if those subsequently submitted by the plaintiff, or some of them, were of the contract quality, it was likewise the duty of the defendant to have accepted such as were of that quality, and to have given the plaintiff the opportunity to deliver hops equal in quality to such samples; and if in such case the defendant rejected them all without giving plaintiff the opportunity to deliver hops equal in quality to those that were up to the contract, then the defendant was in default and guilty of a breach. Again, if you find that both lots of samples submitted failed to come up to the contract quality, but find that under the contract the plaintiff had time after November 4, 1912, in which to make delivery, the defendant could not, by attempting to cancel the contract on that date, lawfully preclude the plaintiff from thereafter delivering hops of the contract quality within the time given for such delivery.

Some question has been made by the defendant in its evidence as to the sufficiency in number and size of the samples submitted by the plaintiff to fairly enable the quality of the hops to be properly passed on. In that regard, as it does not appear that the defendant ever made any objection to the plaintiff on that score, and the latter was left to assume that the samples sent were sufficient in number and size for the purpose for which they were sent, it is now too late for defendant to take advantage of that objection, even if well founded.

Where the article sold is in its nature not entirely uniform in quality, a sample represents the character of a larger mass only approximately, and if the jury find that hops are in their nature not of an entirely uniform quality, and also find that as a matter [305] of custom in the hop trade a sample is regarded as representing the average quality of an entire lot, then the defendant has his full rights if he obtains or may obtain in the entire quantity to be delivered the aggregate or average of quality indicated by the sample. The fact that a number of samples was submitted does not necessarily imply an understanding that each bale of hops shall be equal to the same sample, or that a comparison is to be made separately with each bale of hops. What

is a proper mode of applying the standard of quality is a question of fact which you are to decide from all the evidence in the case.

From what I have said you will understand that if the samples submitted by plaintiff did, as indicated, fairly represent the quality of hops called for in the contract, and that plaintiff was ready and able to deliver the required quantity within the time allowed him for the purpose, then defendant was not justified in attempting to cancel or repudiate its obligation to receive them, and the plaintiff will be entitled to recover the damages suffered by it through defendant's refusal to accept and pay for them. And whether plaintiff had the full quantity on hand or not would make no difference in that respect if he could have procured them in time to make delivery within the terms of the contract; and with reference to the time within which such delivery was to be made, I shall hereafter more fully instruct you.

If at the time of the receipt of defendant's telegram announcing that it cancelled the contract, plaintiff was ready and able, as I have indicated, to comply with its terms, he was entitled to treat this refusal as a complete breach which gave him the right, without further tender, to immediately commence an action for damages. The rule of damages for a breach of contract by a renunciation of it before the day of performance arrives is the amount that [306] the injured party suffers by the continued breach down to the time performance is due, less and abatement by reason of steps by the injured party to protect himself which the law requires him

to take. That is, if you find that the defendant was not justified in refusing to accept the hops in question, the plaintiff is entitled to such damages as will justly represent the amount of its loss between the date of the repudiation of the contract and the time at which it had to make complete delivery of the hops, less the amount he could save by a reasonably prompt disposition of the hops to others at the best price to be obtained, as hereinafter stated, such damages not to exceed the amount demanded in the complaint—which, I believe, is \$32,000.

Where a contract is made, as in the present instance, for the future delivery of a commodity not yet grown or produced, and no time is specified for delivery, the law implies ordinarily that delivery shall be made within a reasonable time after the commodity has been prepared for market. In this case, however, evidence has been introduced tending to show that where in the sale of hops of a crop to be grown no precise time is specified for delivery, it is understood by those dealing in the commodity that the seller or shipper has until the end of the shipping season in which to make delivery, and that this season extends from the time of picking or harvesting to the first of March of the following year. If you find that such a custom or trade usage existed and was known to the parties when the contract was made, then, the contract being silent as to the date of delivery, plaintiff had until the end of such shipping season to deliver the hops specified in the contract. If the hops tendered by plaintiff were of the quality specified in the contract and defendant consequently not justified in refusing their delivery, plaintiff was not required to make further tender of them, but if it had such hops on hand it could proceed to [307] sell them at the best market price obtainable at the time and place of delivery; if there was no market price at the time and place of delivery then at the market price at the nearest market for such commodity, or if there was no existing market price then at the best price obtainable; and if this was less than the contract price plaintiff is entitled to recover the difference between that price and the amount realized by the sale, plus any expenses reasonably incurred by plaintiff in excess of what it would have cost plaintiff to deliver the hops to defendant had the contract been completely performed. It is for the jury to decide what expenses, if any, thus claimed are, under the circumstances, justly and reasonably incurred. While in this case, as I have indicated, plaintiff was required, under the law, upon a repudiation of the contract by the defendant, to proceed with due diligence and expedition to dispose of the hops to the best advantage it could and thus reduce the damages resulting through defendant's breach. If you find there was a breach, he was only entitled to incur such expense in that regard as an ordinarily prudent man would have incurred, such as for brokerage, insurance, storage, cartage, and the like incidents. The mere fact that plaintiff may have paid out certain expenses in reselling the hops is not in itself sufficient to entitle him to recover the expenditure against the defendant unless the jury find that it was a reasonably just and proper one which a man of ordinary business prudence would have considered necessary to incur for the purpose.

In this connection, evidence has been introduced tending to show that the plaintiff after it received notice from the defendant that the latter cancelled the contract began to sell the hops to others. If you find that at the time of the giving of such notice by the defendant to the plaintiff the plaintiff had a [308] sufficient quantity of hops on hand of the quality required by the contract to fill it, and after such notice began to sell such hops to others in the usual and ordinary manner in which hops are sold, and endeavored to obtain the best prices possible, you have a right to consider the prices obtained by the plaintiff on such resales in connection with the evidence as tending to establish the market prices of such hops at the time of such resales. If a contract for the sale of merchandise has been broken by the buyer, and the seller is compelled to resell at a loss, he is entitled to recover the difference between the contract price and the price that he has realized on a resale, together with his expenses, exclusive of interest, interest on this demand not being claimed.

If the time for delivery extends over a period of time, then for the purpose of fixing damages the market value to be considered is that of the last day of the period within which delivery may be made under the contract.

Should you find that the defendant committed a breach of the contract as alleged, but that at the

time the plaintiff did not have the full quantity of hops required to fulfill the contract in his possession or under his control, and thereby was not put to the expense of making a resale of the entire quantity called for by the contract, then the only damages which the plaintiff could recover as to the quantity not on hand would be the loss of profit which it would have made had the defendant completed the contract; and that profit would be the difference between the price at which the plaintiff could then have procured the hops required to fill the contract and the price at which they were contracted to be sold.

Those comprise the specific features of the charge with reference to the claim of the plaintiff.

As to defendant's counterclaim, I advise you, gentlemen of [309] the jury, that there is no sufficient basis in the evidence upon which to rest a verdict for defendant on that demand.

There are certain general considerations which it is proper for me to submit to you.

As I indicated to you at the opening, the law of the case is to be given to you by the Court, and you are bound by that, and bound to apply it to the evidence in the case in reaching your verdict. The facts, however, rest solely and exclusively within the province of the jury to find, and with that the Court is neither disposed nor permitted to in any wise interfere. We are permitted, within the jurisdiction that this Court exerts, to discuss the evidence with the jury if we see fit, but we are not much in the habit of doing so, because our observation of the in-

telligence of the class of jurors that we get in the federal courts is such that we do not find it necessary, and it is our habit usually to leave the consideration of the evidence free from any suggestion by the Court as to its views.

The plaintiff is bound always in a case to sustain the burden of proof upon the affirmative issues that arise out of the pleadings and involving his demand, and in order to recover he must sustain that by what is termed in the law a predonderance of the evidence. Now a preponderance of the evidence simply means that [310] in the judgment of the jury, because they are the tribunal which passes upon that, the evidence on behalf of the plaintiff is in some respects stronger or more persuasive as a basis of their verdict than that presented on behalf of the defendant. It does not mean that the plaintiff is bound to present a greater number of witnesses than the defendant in favor of his claim, because preponderance does not necessarily depend upon the greater number of witnesses. One or two witnesses, or a document or a presumption, may be of such effect by reason of its relation to the other facts in the case as to satisfy the jury that the truth lies in favor of that side, although a much larger number of witnesses may testify directly and positively to the contrary. So that you see your verdict will rest upon what you deem to be the strength of the evidence, independently of the number of witnesses on either side. You are not, however, to judge of the evidence of the witnesses arbitrarily, but your judgment in that respect is to be exercised with legal discretion and in subordination to the rules of evidence.

In this case, Gentlemen of the Jury, a very considerable portion of the evidence consists of what is termed, or has been here termed, expert testimony, Now, it is proper, or it would not be admitted, but your are to understand, Gentlemen of the Jury, that your good judgment, any more than mine, is not to be swerved from its pedestal by considerations that may be suggested from the witness-stand by socalled experts if they do not accord with your reason, based upon all the evidence in the case. The observation of courts in dealing with expert testimony is that almost invariably an expert being produced by one side or another seems unconsciously to deem it his duty to make out a case for the side by which he has been produced. Now, that is not in any wise reflecting upon the character of experts, it is human nature— [311] but it is something that the jury may take into consideration in determining the value that they will ascribe to expert testimony in any case; and in this case you will have a right to apply it in determining the degree of weight or credibility,—because I assume that all the witnesses who have appeared before you are men of credibility,—that you will attach to that class of evidence.

So with reference to the testimony of any witness in the case, whether expert or other, you pass upon his credibility, and you do that by observing his demeanor and manner upon the stand and his apparent bias or prejudice or interest in the case, whether a pecuniary interest or a friendly one, whether an enmity which grows out of relations with the party or through the circumstance of being a rival in trade,—all those considerations you have a right to take into your judgment in determining the credibility that you will accord to any witness.

A witness is presumed by the law to tell the truth. and the jury, in the absence of anything to indicate that a witness has deviated from the truth, must give him the benefit of that presumption; but that does not mean, of course, that you are to abdicate your reason and judgment in passing upon the credibility of a witness, or that you are bound to believe him, no matter how strongly or positively he may assert a fact, if it is one which does not under all the circumstances accord with your judgment. It is in accordance with these principles that you pass upon the credibility of the witnesses and solve, according to your best judgment, the conflicts that have appeared in various particulars in the testimony in the case; and in this way you make up your minds as to what the facts are.

In this case, as I have perhaps sufficiently indicated to you, the crucial and pivotal question is as to the character of these [312] hops. If the hops which were tendered by the plaintiff were of a character such as would be regarded in the trade as coming substantially within the quality specified in the contract in suit, then the plaintiff is entitled to have that contract enforced by an award of such damages as you may find, within the principles I have stated, he has suffered. If, on the other hand, the hops, in your judgment, did not comply with the require-

ments of that contract as to their quality, then he is not entitled to recover, but your verdict in such event would be in favor of the defendant, which would carry defendant's costs.

In the federal courts, gentlemen of the jury, unlike the State system, the verdict of the jury is required to be unanimous. You cannot find a verdict by a less number than the entire twelve, as you may under the present State law.

The clerk has prepared forms of verdict which you will find to meet your necessities in view of the suggestions I have made to you. There is a form here which will enable you by filling in the amount to express your verdict if you determine in favor of the plaintiff. Should your verdict be in favor of the defendant, there is a form which will express that conclusion.

Thereupon and before the jury retired Mr. Powers excepted to those portions of the instructions given by the Judge in the presence of the jury, which are specifically as follows:

The COURT.—(After instructing the jury.) Are counsel desirous of taking any exceptions?

Mr. DEVLIN.—On the part of the plaintiff we are satisfied with the instructions.

Mr. POWERS.—I want to object to that portion with reference to there being no evidence to substantiate the cross-complaint. I want to except to that, and also to that portion charging that the contract was closed by the telegram, and was not modified by the subsequent correspondence. [313]

The COURT.—With reference to the counter-

claim, Mr. Powers, there was evidence introduced upon the question which simply left it to the jury to go into the field of conjecture, as to what your damages were if they should find in your favor, therefore, it did not afford a sufficient basis to give them an amount to pass upon. You may retire, Gentlemen of the Jury.

Mr. POWERS.—In regard to proposed instructions, are they deemed excepted to?

The COURT.—Exceptions should be taken in the presence of the jury, so that the Court may have an opportunity of correcting the instructions before the jury retires.

Mr. POWERS.—I want to object to the refusal to give No. 3, that is all.

Said requested instruction #3 read as follows:

"It is admitted that on October 15th, 1912, the plaintiff sent to the defendant a night lettergram signed E. Clemens Horst Co., of that date, which has been introduced in evidence; that the defendant replied to it by the telegram, signed Pabst Brewg. Co., dated Oct. 21st, 1912, which has been introduced in evidence; that the plainitff replied to the last mentioned telegram by the letter of Oct. 24th, 1912, signed E. Clemens Horst Co., which has been introduced in evidence. That on Oct. 18th, 1912, the plaintiff wrote to the defendant a letter signed E. Clemens Horst Co., which has been introduced in evidence; that the defendant replied to the last mentioned letter by letter dated Oct. 23, 1912, signed Pabst Brewing Co., which has been received in evidence and that the defendant replied to the last

mentioned letter by letter dated Oct. 29th, 1912, signed E. Clemens Horst Co., C. E. Horst, which has been received in evidence;

I instruct you that any contract which was entered into between the plaintiff and defendant before the exchange of these [314] telegrams between October 15th, 1912, and October 29th, 1912, was modified by the last mentioned correspondence. So that even if there was prior to October 15th, 1912, any contract between the plaintiff and the defendant by which plaintiff was to sell and defendant was to purchase two thousand bales of hops at the price of twenty cents a pound, plus freight at Milwaukee, or F. O. B. Pacific Coast, yet from and after this correspondence of October, 1912, it became the duty of the plaintiff if it would fulfill its contract to sell and deliver to the defendant two thousand bales of hops equal to the four samples of hops which the defendant had theretofore sent to the plaintiff and it also became the duty of the plaintiff, if it would fulfill its contract to furnish to the plaintiff before shipping or delivering to the defendant any of the said two thousand bales of hops to furnish to the defendant samples of the hops which it proposed to ship, which samples were required to be equal to the said four samples sent by the defendant to the plaintiff and it was the plaintiff's duty to furnish these samples within a reasonable time after October 21st, 1912, and if you find that the plaintiff did furnish to the defendant the samples of the hops number 25 to 38 mentioned in the said letter of October 29th, 1912, but that the last mentioned samples were not equal in quality to the four samples sent by the defendant to the plaintiff as aforesaid, or if you find that the plaintiff did not within a reasonable time after October 21st, 1912, furnish to the defendant samples of hops equal in quality to the said four samples sent by the defendant to plaintiff then and in either of those events your verdict should be for the defendant."

The COURT.—Very well.

Thereupon the jury retired to deliberate and thereafter returned to the Court a verdict in favor of plaintiff.

WHEREUPON and thereafter and on the 29th day of April, 1914, judgment was rendered and entered upon said verdict in favor of [315] the plaintiff and against the defendant for \$22,625.30.

## Stipulation Re Settlement of Bill of Exceptions.

The settlement of the foregoing bill of exceptions having been regularly continued until the present term of court, it is hereby stipulated and agreed that said bill of exceptions may be presented to the judge who tried the above-entitled case and settled, certified and allowed.

DEVLIN & DEVLIN,
W. H. CARLIN,
Attorneys for Plaintiff.
HELLER, POWERS & EHRMAN,
Attorneys for Defendant.

## Order Settling Bill of Exceptions.

The settlement of the foregoing Bill of Exceptions having been regularly continued to the present term

of Court, and said Bill of Exceptions being now presented in due time and found to be correct, the same is hereby certified and allowed as a true Bill of Exceptions, taken upon the trial of the above-entitled action.

Dated: June 8th, 1915.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Jun. 8, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [316]

United States Circuit Court of Appeals, for the Ninth Circuit.

E. CLEMENS HORST COMPANY (a Corporation),

Plaintiff,

VS.

PABST BREWING COMPANY (a Corporation),
Defendant.

#### Petition for Writ of Error.

The Pabst Brewing Company, a corporation, defendant in the above-entitled action, feeling itself aggrieved by the verdict of the jury and the judgment thereupon entered in favor of said plaintiff, on the 29th day of April, 1914, whereby it was adjudged that the plaintiff recover of and from the defendant the sum of Twenty-two Thousand Six Hundred Twenty-five and 30/100 (22,265.30) Dollars, and its costs, taxed at the sum of Two Hundred Fifty-two and 80/100 (252.80) Dollars, comes now, by Heller, Powers & Ehrman, its attorneys and petitions the

above-entitled court for an order allowing it, said defendant, to prosecute a writ of error to the Honorable United States Circuit Court, in and for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit, and herewith defendant presents its assignment of errors.

And your petitioner will ever pray.

PABST BREWING COMPANY, a Corporation,

By HELLER, POWERS & EHRMAN,
Its Attorneys. [317]
By A. DAVIDSON, Its Agent,

HELLER, POWERS & EHRMAN,
Attorneys for Defendant in Lower Court,
Plaintiff in Error.

[Endorsed]: Filed Feb. 4, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [318]

United States Circuit Court of Appeals, for the Ninth Circuit.

E. CLEMENS HORST COMPANY (a Corporation),

Plaintiff,

VS.

PABST BREWING COMPANY (a Corporation),
Defendant.

# Assignment of Errors.

Now comes the Pabst Brewing Company, a corporation, defendant in the above-entitled action by Heller, Powers & Ehrman, its attorneys, and files the following as the errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause.

### AS TO INSTRUCTIONS TO JURY.

The Court erred in giving the following instructions to the jury which were excepted to on specific grounds by defendant in the presence of the jury and before it left the courtroom to deliberate, which are hereinafter specified, viz:

1st. The portion thereof in the following words:

The telegraphic offers by the plaintiff and their acceptance by the defendant in August, 1911, as shown by the evidence, constituted in law a valid and binding contract as of that date, whereby the plaintiff obligated itself to sell and deliver and the defendant to accept and pay for two thousand bales of choice air-dried Cosumnes hops of the crop of 1912, at the price of twenty cents a pound delivered on

board the cars at Milwaukee, Wisconsin, plus freight, that is, freight to be paid by defendant in addition to the purchase price named; and this contract was in no respect modified or changed by the subsequent correspondence [319] or negotiations of the parties. While this contract did not by its terms require plaintiff to submit samples of hops prior to delivery, the evidence shows without conflict that the parties by their acts so construed it, and it thereby became one of the terms of the contract by which they were bound, because the said contract of the original telegrams was subsequently modified by the letters and telegrams between the parties so that the sale became one of hops equal to samples 21 to 24 submitted by defendant to plaintiff.

2d. That portion in the following words, viz:

As to defendant's counterclaim, I advise you, Gentlemen of the Jury, that there is no sufficient basis in the evidence upon which to rest a verdict for defendant on that demand, because the evidence showed that defendant was compelled to buy certain hops to complete its brewing operations, because it had relied on obtaining the hops under plaintiff's contract of choice character and the actual number of pounds bought and prices paid therefor were in evidence and it was for the jury to decide whether or not they were a proper claim against plaintiff.

3d. The Court erred in refusing to give the following instruction requested by defendant, reading as follows:

"It is admitted that on October 15th, 1912, the plaintiff sent to the defendant a night lettergram

signed E. Clemens Horst Co., of that date, which has been introduced in evidence; that the defendant replied to it by the telegrams, signed Pabst Brewg. Co. dated Oct. 21st, 1912, which has been introduced in evidence; that the plaintiff replied to the last mentioned telegram by the letter of Oct. 24th, 1912, signed E. Clemens Horst Co., which has been introduced in evidence. That on Oct. 18th, 1912, [320] plaintiff wrote to the defendant a letter signed E. Clemens Horst Co., which has been introduced in evidence; that the defendant replied to the last mentioned letter by letter dated Oct. 23d, 1912, signed Pabst Brewing Co., which has been received in evidence and that the defendant replied to the last mentioned letter by letter dated Oct. 29th, 1912, signed E. Clemens Horst Co., C. E. Horst, which has been received in evidence:

I instruct you that any contract which was entered into between the plaintiff the defendant before the exchange of these telegrams between October 15th, 1912, and October 29th, 1912, was modified by the last mentioned correspondence. So that even if there was prior to October 15th, 1912, any contract between the plaintiff and the defendant by which the plaintiff was to sell and the defendant was to purchase two thousand bales of hops at the price of twenty cents a pound, plus freight at Milwaukee, or F. O. B. Pacific Coast, yet from and after this correspondence of October, 1912, it became the duty of the plaintiff if it would fulfill its contract to sell and delivered to the defendant two thousand bales of hops equal to the four samples of hops which the defend-

ant had theretofore sent to the plaintiff and it also became the duty of the plaintiff, if it would fulfill its contract to furnish to the plaintiff before shipping or delivering to the defendant any of the said two thousand bales of hops to furnish to the defendant samples of the hops which it proposed to ship, which samples were required to be equal to the said four samples sent by the defendant to the plaintiff, and it was the plaintiff's duty to furnish these samples within a reasonable time after October 21st, 1912, and if you find that the plaintiff did furnish to the defendant the samples of the hops, numbers 25 to 38 mentioned in the [321] said letter of October 29th, 1912, but that the last mentioned samples were not equal in quality to the four samples sent by the defendant to the plaintiff as aforesaid, or if you find that the plaintiff did not within a reasonable time after October 21st, 1912, furnish to the defendant samples of hops equal in quality to the said four samples sent by the defendant to plaintiff, then and in either of those events your verdict should be for the defendant."

#### Errors in Law.

The Court erred in each instance in overruling defendant's objections to the following questions which rulings were excepted to by defendant because the same were and each was irrelevant and immaterial, and because several of them were improper on the additional ground set after the several respective questions, as follows, viz.:

Questions asked witness E. C. HORST:

1. The question referring to plaintiff's method of

baling hops, viz.:

I will ask you whether or not that is the practice of hop-growers, or whether you did this yourself, and it is an exception to the rule (Exception #1), which question was answered in substance, as follows:

That the usual custom of hop-growers was to bale all hops together but that a certain 4,300 bales of hops of the plaintiff was baled differently.

2. Is there a practice or usuage among hop buyers and hop dealers as to the delivery of hops when no time is specified (Exception #2), which question was answered in substance as follows:

That the dealers had the right to ship the goods at any time up to the end of February or perhaps March of the following year.

3. If no time is specified in the contract for the delivery of hops and the hops are to be of a subsequent year's growth, is [322] there any practice or usuage whereby the seller will have to the end of the shipping season, or if not, what time is he to fulfill the contract for the delivery of those hops? (Exception #3) which question was answered in substance as follows:

That the seller had until the end of the shipping season to make his delivery.

4. Will you state whether or not the hops that you grew on your place in 1912 were or were not choice air-dried Cosumnes hops, which question was answered in substance as follows:

That the samples sent were choice air-dried Cosumnes hops and were from certain 4,300 bales referred to by the witness.

This was objectionable on the additional ground that the hops therein referred to were in no manner connected with the defendant or the cause of action in this case.

5. What did you do with these 2,000 bales of hops that you sold to the Pabst Brewing Company and that they refused to accept? (Exception #7) which question was answered in substance as follows:

That plaintiff sold 2,000 bales through its travelling men in the eastern States.

This was objectionable on the additional ground that it assumed that there was a certain specific 2,000 bales actually sold to the Pabst Brewing Company and that defendant actually refused to accept the same, when nowhere in the testimony is that fact established.

6. Q. How many pounds does a bale of hops contain? Which question was answered in substance as follows:

About 200 pounds.

7. Also the several questions asked witness Horst as to the amount of travelling expenses, insurance and brokerage from an examination of the entries in the books which were records of [323] expenditures by persons employed in New York and Chicago; which questions were answered in substance as follows:

That certain books kept by the bookkeeper in San Francisco showed entries made by local San Francisco clerks from reports from agents and representatives in the eastern States as to the amount received for hops and travelling expenses, insurance, brokerage and the like, and included some 40 sales with the names of the purchasers and the prices paid.

Because the same were hearsay and also because the books were the best evidence.

8. State what in your opinion, was the reasonable price that you could have realized from the sale of 2,000 bales of air-dried choice Cosumnes hops, if sold in that quantity, in the month of February, 1913, at the nearest market. Which question was answered in substance as follows:

Eleven to twelve cents a pound.

This was objectionable on the additional ground that the contract was broken in the early part of November and sales in February, 1913, were not within a reasonable time thereafter and because it had not been proven that there was any 2,000 bales of choice air-dried Cosumnes hops in plaintiff's hands at that time available for the Pabst Brewing Company.

9. Then state whether an expert could form a fair and accurate opinion as to quality of hops of 1912, by the samples now in the courtroom in their present condition. Which question was answered in substance as follows:

That he could not because the samples were aged and had been mussed up.

This was objectionable on the additional ground that it calls for the conclusion of the witness of another's man's mind and argumentative. [324]

10. Would the samples have to be kept preserved

in order to give the Court and Jury a fair indication of what the hops were two years ago that those samples were supposed to represent. Which question was answered in substance as follows:

That the samples should be kept tightly wrapped and properly handled.

11. Please state what was the market price that could be obtained in the month of February, 1913, at the nearest market for that class of hops in February, 1913 (Exception #11), which question was answered in substance as follows:

Eleven to twelve cents a pound.

This was objectionable on the additional ground that February, 1913, was not a reasonable time after the breach of contract and that there was no definite 2,000 bales of hops identified concerning which the price could be made.

The Court erred in sustaining plaintiff's objections to the following questions:

12. Q. Asked Witness Horst: What steps, if any, did you take to set aside that 2,000 bales for the Pabst people on November 4th, 1912, when the defendant notified the plaintiff that they would not take the hops offered? I want to know whether plaintiff segregated any hops at that time for the Pabst people.

The substance of the testimony rejected was, that no steps whatsoever were taken by the plaintiff to segregate any 2,000 bales of hops for the Pabst people at that time nor at any time until after the sales were made and then plaintiff allotted so much of the sales of 4,300 bales all identical in character, as were

sold at a loss to the defendant (Exception #12).

13. Q. Asked: Did you when the Pabst people notified you they would not take these goods because of their quality, set aside or take any steps to set aside or to use any marks or any indications [325] that any portion of the 2,900 bales were set aside for the Pabst people?

The substance of the evidence rejected was as follows:

At that time the witness testified that he had 2,900 bales on hand, and the evidence rejected would have established the fact that none of these bales were in any way ear-marked as being property of the defendant, or being set aside for the defendant, but all of them were sold indiscriminately and such of them as were sold at a loss were claimed to be defendant's.

14. Q. Did you have any other hops on hand, save and except these 2,900 bales of your own Cosumnes raised hops with which to fill the contract that had been accepted?

The rejected testimony would have established the fact that there were no other hops on hand and the hops on hand were all of a character which did not comply with samples 25 to 38.

The Court erred in overruling defendant's objections to the following questions:

15. Q. Asked Witness Horst: How much do you estimate that the overhead expenses were increased by the fact that you had to sell through agents in Chicago this 1500 bales of so-called Pabst hops? (Exception #71) which question was an-

swered in substance as follows:

About \$4,000 or \$5,000. The only basis of the evidence was hearsay testimony of reports made by others; there was no specific 1500 bales in any way connected with the defendant.

16. Q. Asked Witness Conrad: What would you say as to the quality of the crop of 1912, the 4,300 bales, as to being choice hops or not? Which question was answered in substance as follows:

That they were choice.

The following questions asked Witness Lange:

17. Q. Have you made an examination of the books for the [326] purpose of ascertaining the price at which they (the hops of plaintiff) were sold and the persons to whom they were sold and what books did you have to examine to do that? The question was answered in substance as follows:

That he had examined the books of plaintiff to find out to whom defendant's hops were sold after November 4th, 1912, and that he figured out the average number of days and took the value of the hops and figured the insurance, interest and that he went through plaintiff's books and found the prices at which plaintiff had sold the 2,000 bales of defendant's hops to other parties after November 4th, 1912.

This being objectionable because there was no 2,000 bales set aside for defendant; the segregation did not take place until long after the sales were made; all of the entries in the books were made by other persons than Mr. Lange and the facts entered

were not known to the person making the entries. (Exception #35.)

18. What is the aggregate of the miscellaneous charges for the sale of the Pabst goods? Which question was answered in substance as follows:

That the witness had figured out that the overhead expenses of the business was \$4,459.30, by taking the storage charges, local freight, sampling and other charges like that which he had vouchers to cover in the regular course of business, and that the items of these charges were made in the east and reported to the San Francisco office.

This was objectionable on the additional ground that it called for hearsay evidence as to what the charges were and a conclusion of law as to whether the charges were in any way connected with the 2,000 bales sold defendant. The expenses were made in the east and paid out by plaintiff's employees and the purposes [327] for which they were paid out could only be ascertained from the man who paid them out. Certain entries of other persons were made by the witness from statements made by some one else and they were necessarily hearsay, irrelevant and immaterial.

19. Q. Asked Mr. Lange: Did you figure any interest on losses? Which question was answered in substance as follows:

That the witness figured interest approximately on \$2,300 difference in the price between the price sold to Pabst and the price sold to the other parties. Most of the sales made of the 1920 bales were sold on delivery prices at the town where the brewery was follows:

20. Please state what you put into the selling cost and how you arrived at it to be distributed to these 2,000 bales?

Which question was answered in substance as follows

That all of the agents and salesmen throughout the United States turned in expense slips to the San Francisco office, thereby showing the eastern expenses and the witness tabulated these expenses after he had left out such items as estimates for office force and the like. This was done between the dates of November 5th, 1912, and June 30th, 1913, which he considered to be the selling season for the 2,000 bales. (Exception #38.)

This was objectionable because the witness already testified that he knew nothing about any selling price except by hearsay, and whether any of these expenditures made were in any manner connected with Pabst goods, was necessarily hearsay, and the witness did not pretend to have any knowledge as to the reason for any expenditures nor price, nor the manner with which the expenditures were connected with the Pabst goods and the great bulk of the Pabst goods were sold long prior to June 30th, 1912, and many of these expenditures are for salaries incurred without any connection [328] whatsoever with the Pabst goods.

21. Beginning on November 4th, 1912, until you finished selling the remainder of the bales, about 1300 and some odd bales, were there certain expenses incurred in New York and Chicago and eastern States in selling the remainder of the 2,000 bales

of what we call the Pabst hops and other hops? Which question was answered in substance as follows:

That there were. That it appeared from the books of the company that the expenses referred to by him were incurred in New York and Chicago in selling 2,000 bales belonging to Pabst when in fact there were no 2,000 bales set aside for Pabst and the witness did not know anything about what the expenses were incurred for.

This was clearly based on hearsay testimony and there was nothing to indicate which 1300 bales out of the 2,000 bales on hand were Pabst goods and witness did not know of his own knowledge in what manner any expenses had been made for these particular goods.

22. And in lieu of a cent and a half a pound, you are simply giving here a proportion of the overhead charge in the New York office for selling these 1300 bales of hops. Is that correct? Which question was answered in substance as follows:

Yes.

23. A series of questions asked Witness Lange concerning his examination of the books and the vouchers and his application of storage charges, local freight, cost of calculation, discount and the like, which questions were answered in substance as follows:

That the books of the company showed that the eastern agents had made sales of some various lots of bales from 4,300 bales harvested that season all of the same character, and that [329] a short

time before the trial of the case Witness Lange had compiled the sale prices of some 1300 bales that had been sold at a loss and had estimated these various charges and had considered that these goods were Pabst goods and that the said expenses were incurred as necessary for the sale of the Pabst goods.

And also

Q. Explain the other items of overhead, such as bad accounts (Exception #36), which question was answered in substance as follows:

We invoiced the goods at a certain price. We had to collect them through collection agencies, and got a less price. In this case we have not been able to collect at all for them. We lost the money.

This is objectionable because none of these goods had been set aside as Pabst goods at the time the sales were made and the losses incurred.

And also the question referring to the salaries paid to the salesmen and the charges of the stock-room and the like, viz: "And they related to the 2,000 bales of hops and also to the other hops?" Which question was unswer in substance as follows:

That he knew in the ordinary course of business that these charges related to the 2,000 bales of hops belonging to Pabst.

The testimony was necessarily hearsay.

24. Did you make any calculation as to the proportion of the expenses these 1,300 bales bore to the total expense, that you have just described? Which question was answered in substance as follows:

That he made these calculations from sales books in daily use and that it took him five or six days to make the examination from books, the entries of which had been made by other parties and the items on which the entries were made were all transactions [330] which occurred in the eastern States and about which the bookkeeper making the entries knew nothing and the witness knew nothing.

On the ground that the same called for the conclusion of the witness on the question of law, namely, the proper method of apportioning expenses amongst various classes of hops on hand under varying conditions which were not before the jury and also was necessarily based on hearsay as to the services performed by various people connected with the sale of the Pabst goods, and was an attempt to put into the record evidence which should have been obtained from the employees who made the expenses, and knew why the services were performed, and what the expenses were.

- 25. Have you made correct estimates on the basis that you have given to the Court for your circulation? Which question was answered in the affirmative.
- 26. What do you say as to these samples being choice or otherwise? Which question was answered in substance as follows:

That the hops were choice.

Because the witness was not shown to be an expert.

27. Please state what your examination discloses to have been the price obtained from the resale of the 2,000 bales of hops that it is claimed was sold to the Pabst Company and refused to buy it?

Which question was answered in substance as follows:

That the 2,000 bales were resold at the average price of .1366 or \$23,584.80.

This was objectionable on the additional ground that the answer must necessarily be based on hear-say evidence and on conclusion of law as to what was the proper method of apportioning the 2,000 bales and which 2,000 bales were to be used as basis of determining the price and presumes the existence of testimony showing the character, class and quality and condition of remaining [331] bales included in the computation which was not before the jury.

28. Will you state the result of the examination of the books of the plaintiff for the purpose of ascertaining what the books show was the loss that had been sustained by plaintiff measured on the assumption that the hops were sold to Pabst Company at 20 cents a pound and what plaintiff actually received for the hops, together with the cost of reselling them? The question being answered in substance as follows:

\$32,651.73 plus several items that I have tabulated in accordance with my previous testimony. If we had charged a commission of 1½¢ instead of the overhead charges, the total loss of 4,000 pounds would be \$34,192.43.

On the additional grounds stated in the last three questions.

29. The Court erred in allowing all questions concerning the entries in the books to Witness Lange.

With reference to the connection that the several expenses incurred during the months of November, December, January and February had to the 2,000 bales of Pabst goods, or to the defendant.

Because the answer elicited brought out the fact that the expenses were incurred in the general course of business; that there was no 2,000 bales specifically set forth to defendant and that all the items of the expenses were entirely hearsay and no witness had testified as to their correctness or their connection to defendant or goods belonging to defendant.

- 31. The Court erred in denying defendant's motion to strike out the answer of Witness Lange that the most of the sales made of the 1920 bales of the 2,000 bales sold other parties after November 4th, 1912, were sold on delivery prices, on the ground that it takes for granted the fact to be in evidence that there were 2,000 bales sold on account of the Pabst Company.
- 32. Q. Asked Paul E. Peterson: Look at the samples of the hops and state to the jury whether you consider them in your [332] opinion choice hops. Which question was answered in substance as follows:

That the samples were choice.

On the ground that the witness Peterson was not shown to be an expert. (Exception #21.)

33. Q. Asked Witness Conrad: What would you say as to the quality of the crop of 1912, the 4,300 bales, as to being choice hops or not? The question being answered in substance as follows:

That the said crop was choice.

On the further ground that the witness was not shown to be an expert.

34. Q. Asked Witness Marks: Suppose I should put 2,000 bales of rejected hops in your hands at the close of the season in November, 1912, that were rejected by a large brewery in the east, and you had to employ men in Milwaukee, New York and Chicago to sell some of them and you had to hire solicitors, would you only pay them one-half a cent a pound? The question was answered in substance as follows:

That the witness did not know what the charge would be, but it would be more than a half a cent a pound.

35. Q. Asked Witness Horst: On November 4th, 1912, if defendant was willing to accept, were you ready, able and willing to deliver the 2,000 bales of hops equal in quality to samples 21, 22, 23 and 24? Which question was answered in the affirmative.

It was calling for the conclusion of the witness on a question of law.

36. Q. Asked Witness Zepfel: State whether samples 1 to 20 were choice hops. Which question was answered in the affirmative.

Because the witness was not a quality hop expert. Because the witness was not shown to be an expert on the subject. [333]

37. To the question asked Witness Theodore Eder: What have you to say as to the quality of hops raised by Mr. Horst in the Cosumnes district in 1912, as being choice or otherwise? Which question was answered in the affirmative.

#### AS TO OBJECTIONS SUSTAINED.

The Court erred in each instance in sustaining plaintiff's objections to the following questions because the same were all addressed to relevant and material matters, and for other reasons given to certain specific questions hereinafter, viz.:

38. Q. Asked Witness Horst: Did you not in the latter part of November, 1912, buy some Cosumnes hops from Wolf, Netter & Co.? The substance of the testimony rejected was, that plaintiff had bought a quantity of Cosumnes hops from Wolf, Netter & Co., at  $17\phi$  a pound.

On the additional ground that the reason for the ruling was that the testimony must be confined to air-dried Cosumnes hops, and the agreement between the parties as finally made was that the defendant would accept hops equal to four samples 21 to 24 and the contemporaneous interpretation of the parties was that any kind of Cosumnes hops would fulfill the contract.

39. Q. Did you buy Cosumnes hops of the same quality as air-dried Cosumnes hops in the latter part of 1912?

The substance of the testimony rejected being that the plaintiff itself purchased Cosumnes hops of the same character as the samples in question at  $17\phi$  a pound.

On the additional ground that the Court refused to allow the said question unless it was modified to apply to air-dried Cosumnes hops.

40. Did you buy hops in San Francisco of a character which was accepted by the trade as Cosumnes

hops which could have been used as a delivery on the four samples numbered 21 to 24, submitted [334] by the Pabst Brewing Company to you? The substance of the testimony being that the plaintiff itself purchased Cosumnes hops of the same character as the samples in question at 17% a pound.

On the additional ground that counsel for defendant had given as his purpose that the answer would show that while plaintiff sold Pabst hops for 14 and 15 cents, that they at the same time bought other hops of the same character at 17 cents, and did not use proper care in the sale of hops and that it was preliminary first to show that plaintiff bought Cosumnes hops and then that the hops thus bought were the same character commercially as air-dried hops and thereafter.

The Court rules that it would not permit the testimony concerning the price of any hops bought that were not air-dried Cosumnes hops.

41. I want you to state whether the 4,500 bales were stored? (Exception #66.) The testimony rejected was the means of establishing where all the goods manufactured by the plaintiff and which plaintiff claimed was capable of completing the delivery was stored, and in that way defendant would have been able to show that the plaintiff did not have 2,000 bales on hand on November 4th.

Because it was essential on cross-examination to know the whereabouts of all air-dried Cosumnes hops grown from the time they were stored till sold, to determine whether or not there was 2,000 bales available on November 4th, 1912, and the proper amount to be

allowed as damages incurred in selling the same.

- 42. What bales of Cosumnes hops had you on November 4th, 1912, already set aside to fill contract sales in existence? (Exception #67.) The substance of the testimony rejected would show that a large number of the 4,300 bales manufactured by plaintiff had been set aside to fill contracts in existence and thereby [335] prevented plaintiff from being able to fill its contract with defendant.
- 43. Did you buy hops in San Francisco of a character that was accepted by the trade as Cosumnes hops which could have been used as delivery on the four samples 21 to 25 submitted by the Pabst Brewing Company to you?

The rejected testimony would have shown that plaintiff purchased hops in San Francisco which could have filled his contract at  $17\phi$  a pound and he claimed to be damaged because at that date they were only salable for 11 and  $12\phi$  a pound.

On the additional ground that the Court announced that plaintiff would not be bound to make any purchase of hops that he might imagine would be acceptable under his contract when they were not the hops that were called for by the contract and the attorney for defendant saying:

"It is for the purpose of showing that while he sold our hops for 14 and 15 cents, that he bought other hops for 17 cents of the same character, and therefore he did not use proper care in the sale of our hops."

The COURT.—If you have reference to the same character of hops stipulated for in the contract, I

will admit; otherwise I will not.

COUNSEL.—It is preliminary, first, that he bought Cosumnes hops, and then I want to show that they were not of the same character commercially as air-dried.

The COURT.—I will permit you to show that he bought air-dried Cosumnes hops.

Mr. POWERS.—I have stated my purpose. May I now renew my objection with the purpose stated, and save my exception? That goes to all the questions.

# The COURT.—Yes. [336]

44. Will you give me the deliveries and dates of delivery of Cosumnes goods that you made on your contracts which were in existence at the time of the commencement of the season in 1912?

The substance of the testimony rejected was that a large amount of the goods which were on hand at the commencement of the season and available for delivery to defendant, over 600 bales were sold for prices far in excess of those testified to by the plaintiffs' witnesses.

45. Also, give me the price for which you sold the 3,062 bales plaintiff had on hand on November 4th, 1912, at the time of selling the 2,000 bales on account of Pabst.

The substance of the testimony rejected was that a large number of 3,062 bales over 600 bales, were sold at prices far in excess of the prices obtained on other goods set aside to defendant.

46. Is it a costly matter to assemble the office force?

The substance of the testimony rejected was that a great part of the overhead expenses were maintained for the general business of preventing the cost of assembling a new office force for the succeeding year and not because of the sale of the Pabst goods.

47. Will you give me the amount of the general expenses for the month of July, 1913, and then we can see how they differ from the month of June.

The substance of the testimony rejected was the expenses in July and June were practically the same.

48. What allotment had been made to these various contracts when the Pabst contract was breached, according to your theory, November 4th, 1912?

The substance of the testimony rejected was that no [337] specific bales had been allotted to any of these contracts by allotments made of November 4th, nor until several months thereafter.

49. Kindly give us the amount that the 1060 bales finally sold for.

The substance of the testimony rejected was that 1060 bales sold for prices far in excess of the prices obtained for contracts that were alleged to have been filled with goods held for Pabst account, some as high as 26 cents a pound.

On the additional ground that the hops were used after November 4th, 1912, to fill orders made prior to November 4th, and these were available for the Pabst order, and the jury would have had the right to have considered that the money received for those hops was a proper credit to be given on the damages to the defendant.

50. Look up and see whether there was any reduc-

tion of prices to the brewers because of a rejection of Cosumnes hops in 1912.

The substances of the testimony rejected was that the prices testified to for a large amount of the goods claimed to be Pabst goods was at a reduced figure because they had been rejected by other brewers because of poor quality.

On the additional ground that the basis of the ruling was that the only contract for choice air-dried Cosumnes hops made by plaintiff was with the Pabst contract and as a matter of fact the question was addressed to whether or not the Cosumnes hops of plaintiff had been rejected for bad quality.

51. What services, if any, did the stenographer perform with reference to the Pabst goods, if you know of your own knowledge?

The substance of the testimony rejected was that the witness knew nothing of his own knowledge of the services performed by the stenographer nor their connection with the so-called Pabst goods. [338]

52. Q. Asked Witness Horst: What steps, if any, did you take to set aside that 2,000 bales for the Pabst people at that time?

The substances of the testimony rejected was that plaintiff took no steps to identify any 2,000 bales then on hand as the goods of defendant.

Because it was absolutely necessary to know the facts involved in the question, in order to intelligently determine what damages had been sustained by breach of the contract.

53. Q. Did you, when the Pabst people notified you that they would not take these goods because of

their quality, that it was not according to their understanding of the contract, set aside, or take any steps to set aside or to use any marks or any indications that any portion of the 2,900 bales were set aside for the Pabst people?

The substance of the testimony rejected was that plaintiff did not take any steps to set aside or use any marks to indicate any portion of goods on hand for defendant.

54. Did you have any other goods on hand save and except these 2,900 bales of your Cosumnes raised hops to fill the contract that had been accepted?

The substance of the testimony rejected was that plaintiff did not have any other goods on hand to fill defendant's orders except hops raised by itself.

For the same reason as that given to the last question.

55. Q. Were the samples 25 to 38 of Cosumnes hops all air-dried Cosumnes hops, or were they other kinds of hops?

The substance of the testimony rejected was that samples 25 to 38 were in part Cosumnes hops which were not air-dried.

- 56. Q. Is there any way you have of refreshing your memory so that you could tell us? [339]
- A. No, they are all air-dried. I do not think they were all Cosumnes hops. I could tell which were Cosumnes hops by looking at the marks on the samples.
  - Q. Will you do so, please.

Mr. POWERS.—My question is, were the 25 to 38 samples all Cosumnes hops, all air-dried Cosum-

nes hops, or were there other kinds of hops?

Mr. DEVLIN.—I object as irrelevant, incompetent and immaterial.

The COURT.—Objection sustained.

The substance of the testimony rejected was that a portion of the samples were not air-dried and it was relevant because the answer would establish the contemporaneous interpretation of the character of hops intended to be covered by type samples 21 to 24.

57. Suppose you cut the quantity of 2,000 bales up into ten lots of 2,000 each, would they have been more salable?

The substance of the testimony rejected would have been that if the 2,000 bales had been offered in lots of 200 each that they would have found ready salability at prices 17 to 18 cents in California and 21 to 23 cents in the east, and it was error because the question was overruled on the ground that the matter had been gone over time and time again when as a matter of fact the said witness had never answered the said question or any of the same character.

58. Q. Asked Witness Conrad: Was there any reason why plaintiff's hops should have sold at less figure than anybody else's that year?

The substance of the testimony rejected was that the only reason plaintiff's hops should have been sold at less figures, was because they were of poor quality. [340]

59. Q. Asked Witness Lange: Was there any act done by the Horst Company so as to segregate 2,000 of the 3,000 bales after November 4th, so that any

person other than the Horst people themselves could determine which of the 3,000 bales were to be considered as Pabst goods, and sold on the Pabst account? (Exception #50.)

The substance of the testimony rejected was that no steps were taken by any person who knew which of the Horst goods were Pabst goods and which were not and there was no means of witness knowing which of the goods were being sold as Pabst goods.

60. Q. Was it necessary to maintain an office in New York with a manager's salary at the sum of \$500 per month in order to sell 16 bales of Cosumnes hops? (Exception #51.)

The substance of the testimony rejected was that the expenses were not necessarily incurred in any way for defendant.

61. Q. What was the expense of the New York office for salaries while those 16 bales were on hand to be sold on June 1st? (Exception #52.

The substance of the testimony rejected was that the salaries were in excess of \$500 per month.

62. Q. How many of the Pabst goods were on hand unsold on January 1st, 1912?

The substance of the testimony rejected was that the number of bales on hand at that time was less than 100 and it was material, because at that time a large number of expenses were being prorated to the Pabst goods and it was for the jury to determine whether or not an ordinary reasonably careful man would have used the method of selling which required a manager at \$500 per month and to pay for Christmas presents to the stenographer and to hire stenog-

raphers when but 16 bales of hops were on hand. The testimony had already developed that the bulk of the so-called Pabst goods had been sold in the months of November [341] and December, 1912.

63. Q. Asked Witness Marks: What would be the reasonable market value of a hop of the character of samples 1 to 20 if it were choice, in the month of November, 1912?

The substance of the testimony rejected was that the said value was 17 to 24¢ a pound in the Sacramento market.

64. Q. Asked Witness Marks: Suppose you cut the price to 16½ cents, how long would it take you to have sold 2,000 bales?

The substance of the testimony rejected was that it would have taken less than two weeks to have sold the goods at that price.

65. Q. Asked same witness: Was the market in a position at that time, if the price of hops was cut down to 16 cents, to have taken 2,000 bales, or not?

The substance of the testimony rejected was that the market would have taken 2,000 bales at that price very readily inside of two weeks.

66. Q. What would be the reasonable market value of choice air-dried Cosumnes hops at that time, dried in accordance with the process, whereby drying was made by forcing air from the outside in through the hops?

The substance of the testimony rejected was that the reasonable market value of such hops was 17 to

67. Q. You have seen certain samples of the Horst

 $20\phi$  a pound in the Sacramento market.

hops. What would be the reasonable market value of a hop of the character of one to twenty if it were choice, in the month of November, 1912?

The substance of the testimony rejected was that the value was 18 to 20¢ in the Sacramento market. [342]

68. Q. What was the reasonable value of choice air-dried Cosumnes hops dried under a process whereby the hot air is put into the kiln from the outside?

The substance of the testimony rejected was that the value was 18 to  $20\phi$  in the Sacramento market, in November, 1912.

69. Q. Asked Witness Sweeney: Did you actually sell the Pabst Brewing Company some hops of a choice character in November, 1912, for their brewing purposes?

The substance of the testimony rejected was that the witness sold hops to defendant for  $22\phi$ .

70. Q. Are you familiar with the reputation of brewers throughout the United States with reference to their character and in the matter of rejecting goods and their reputation for rejecting goods?

The substance of the testimony rejected was that the witness was familiar and that the Pabst Brewing Company had never rejected any hops except those of Horst and his brother, and the testimony was admissible because Mr. Powers' statement that it was rebuttal of Mr. Horst's testimony that the Pabst people had a reputation for rejecting goods.

- 71. The Court erred in requiring Witness Sweeney to confine his testimony to air-dried hops under the following circumstances:
- Q. Asked Mr. Powers: Were you familiar with the value of Cosumnes hops in the month of the year 1912? A. I was.

Mr. DEVLIN.—I shall object unless the inquiry be confined to air-dried hops.

The Court then said: "He does not think that has any significance. I am bound to instruct the jury that it has. It characterizes the class of hops that are called for by this contract. [343] Confine yourself to air-dried hops."

72. The Court erred in sustaining defendant's objections to the question asked Witness Chalmers:

What was said to you by the man in charge with reference to the manner of baling the hops so far as the leaves and twigs were concerned?

The substance of the testimony rejected was that the man in charge said that plaintiff had instructed witness to bale the hops, permitting the leaves and twigs to go into the bales.

This was relevant testimony as statements made by a representative of the corporation, with reference to the baling of the hops in question.

73. Q. Asked Witness Chalmers: While you were at the Horst hop house and seeing the picker at work in the manner in which you state, did the man in charge say anything to you about the manner in which he was picking hops so far as the leaves and stems were concerned?

The substance of the testimony rejected was that

the man in charge of plaintiff's hop-picking machine said that he was instructed to permit leaves and stems to go in because they had a cheap contract in the east and the testimony was that the Pabst contract was the only contract on hand at that time.

The question was relevant because directed to matter entirely relevant, competent and material because the hops there referred to were a portion of the 4,500 bales which Mr. Horst had testified were all of the same character, as to cleanliness with the exception of a few bales called clean-ups.

74. To the question asked Witness Chalmers: Was anything said by the man concerning instruction, because of certain goods that were to be used to fill an eastern order? [344]

The substance of the testimony rejected was that the man said he had instructions from plaintiff to permit everything to go into the bales because plaintiff had a large eastern order to fill.

Same was relevant because offered in rebuttal of Mr. Horst's testimony that the goods were picked unusually clean and was entirely relevant and material because of testimony that the Pabst contract was the only contract of plaintiff referring to airdried hops.

75. Q. Asked Witness Chalmers: At that time you say you were employed taking care of your crop?

The substance of the testimony rejected was that the plaintiff was occupied in carrying on his usual vocation.

76. Q. Asked Witness Chalmers: What, if anything, was said by the man in charge of the picking

machine concerning instructions with reference to hops that were going into the picking machine?

That the substance of the testimony rejected was that the man in charge said he had instructions to allow the stems and leaves to go into the bales through the picking machine together with the hops.

The testimony was entirely relevant because the hops themselves were a portion of the 4,500 bales which Mr. Horst testified were of the same general character as to cleanliness.

77. Q. Asked Witness Chalmers: Do you know about the relative time that hops usually ripen?

The substance of the testimony rejected was that all hops in that vicinity ripened at about the same time and that none of plaintiff's hops were ripe enough to pick at the time plaintiff commenced picking them.

78. The Court erred in objecting and sustaining objections to all [345] questions asked Witness Chalmers covering the operations of plaintiff's picking machine.

The substance of the testimony rejected was that witness visited the picking machine and saw that the hops being picked were unripe and that the machine was out of order and that the stems and leaves were being permitted to go into the machine and to be baled and that the man in charge said he had instructions from plaintiff to permit them thus to be baled.

This was relevant because the testimony that the leaves and stems were being intermingled with the hops was in direct rebuttal of Mr. Horst's statement

that the leaves and stems were segregated and put in separate bales and was rebuttal, and the testimony with reference to the fact that a part of the machine was not working, and that the employees had instructions to let everything go in, all was rebuttal of Mr. Horst's testimony and went to show that the hops were uncleanly picked.

- 79. The Court erred in striking out all of the testimony of Witnesses Chalmers and Traganza during the argument of the trial of the case. The character of this testimony is set forth in the last six specifications herein.
- 80. Q. Asked Witness Gustav Pabst: You may state, the fact, if any there be, whether or not the Pabst Brewing Company, relied upon the fact that the plaintiff sent the samples as evidencing plaintiff's compliance with the demand as to samples made in the purchase order.

The substance of the testimony rejected was that the Pabst Brewing Company relied upon the sending of the samples as an evidence that plaintiff acquiesced in defendant's demand for samples.

Because the contemporaneous interpretation of the telegrams [346] and letters was material.

81. Q. You may state whether the sending of the samples as evidenced by letter of September 28th, 1912, influenced your mind as to the acquiescence of the plaintiff in the necessity for sending samples.

That the substance of the testimony rejected was that defendant's mind was influenced by the sending of said samples as an evidence of the acceptance therefor.

82. Q. Did Mr. Zaumeyer to whom you referred in your testimony, report to you the finding in respect to the various samples submitted by plaintiff?

The substance of the rejected testimony was that Mr. Zaumeyer reported that the samples were not choice.

83. Q. You may state whether or not it was the duty to make report to you as the president of the corporation, upon the inspection of such samples.

The substance of the testimony rejected was that Mr. Zaumeyer was employed to pass upon the quality of the samples.

84. Q. You may state whether the receipt of the samples 1 to 20 had any influence in the conduct of the business of the Pabst Brewing Company.

The substance of the testimony rejected was that defendant was compelled to demand further samples in order to know whether plaintiff was in position to furnish defendant with its stock of hops necessary for the season and that the sending of samples by Horst indicated an acquiescence in the selling order contract as prepared by defendant.

85. Q. Asked Witness Traganza: Did the man in charge of the picker, state what his instructions were with reference to handling the leaves and stems? [347]

The substance of the testimony rejected was that the picker stated that he had instructions that the leaves and stems should be permitted to go into the picking machine and to be baled with the hops. IN ADDITION TO THE FOREGOING THE COURT ERRED IN THE FOLLOWING PARTICULARS:

86. In permitting the introduction of the night letter sent by Horst to Pabst, dated November 5th, 1912, over defendant's objections, on the ground that it was offered as a compromise.

San Francisco, Nov. 5/1912.

Pabst Brewing Co.,

Milwaukee, Wis.

Replying your yesterday's wire received today, we disagree with your comments on quality of samples sent you and to your statement that we are unable to comply with our contracts with you Please wire us in what respects you claim samples twentyfive to thirty-eight inclusive to be below contracted quality and whether you claim none of all samples sent you is equal contracted quality. Please also wire whether you will pay us decline in market if we consent cancellation two thousand bale sale we cannot release contracts without proper settlement. we suggest that our letter October eighteenth offers fairest method of adjusting matter. We are willing submit further samples and are willing that Chief Inspector of San Francisco Chamber of Commerce or other high class competent disinterested parties to be agreed upon shall pass upon quality.

E. CLEMENS HORST.

Charge E. C. H. Co.

137 Words.

87. In permitting the following letter to be introduced, to wit:

"San Francisco, Oct. 18th, 1912.

In reply refer to H-53959.

Pabst Brewing Co.,

Milwaukee, Wis.

## Gentlemen:

We are without answer from you to our wire of Oct. 15th. As you will not take the 2000 bales hops sold you on quality equal to any of the 20 samples we sent you, nor commit yourselves to take any hops equal to the four samples you sent us, we feel the fair plan that should be most suitable to you will be to agree upon a difference in price to be paid us on the 2000 bales.

To arrive at that amount, we should get, if market had not changed, the fair profit as between simultaneous buying and selling prices, and as market has declined we should get in [348] addition, the decline in the market, but if you think that this is asking too much we are ready to accept, subject to our confirmation within three business days after receipt of your reply, whatever may be the difference between the contract price and any figure you may offer us now on 2000 bales 1912 hops equal to the four samples you sent us, or to the selection of the 20 we sent you. The new offer to be made on basis of delivery in lot or lots at sellers option during October to February inclusive, and official inspection of the San Francisco Chamber of Commerce, or other inspection to be mutually agreed upon, to be final.

Or if you prefer to delay the fixing of price on above plan, we are willing that you pay us the difference as of a later date plus what would be the carrying charges on 2000 bales hops, which we estimate to amount to about \$750.00 per month, covering interest, storage, insurance and loss in weight. The delay in delivery has already entailed a loss of \$1000.00 on such charges, but we are not asking you to make good that \$1000.00.

On our above plan you cannot increase your losses nor your hop stocks, because if we accept the price you offer on the new 2000 bale deal you will not have increased your stocks, as our acceptance of your offer will have cancelled the old deal and the new price you offer will be used as a basis for our arriving at the amount of money you should pay us by reason of cancellation of your present contract.

We have made our suggestion for the new offer to buy 2000 bales simply so you do not wire us a too high price for basis of adjustment.

You no doubt realize that 2000 bales hops is an enormous block of hops to sell at any time of the year and at a time as *last* as this it is always much harder to sell California hops and there is an enormous lifference between the price at which any one in the Hop business would buy 2000 bales and the price at which he would sell 2000 bales, unless, of course, the purchase was being made without speculation against a concurrent sale or offer.

In order to realize anything like current prices for hops they have to be peddled at enormous selling costs and we really do not know how long it will take us to sell elsewhere 2000 bales California hops so late in the season, but we want to help out all that is possible.

We made you a number of offers to change your purchases to Sonomas, Oregons, Washingtons, Yakimas, States or foreign 1912's, or to change from 1912's to future years, all at fair price differences to be agreed upon, but regret that these suggestions, as well as our offers, both before and since the harvest, to resell for your account your 2000 bales purchase were all declined.

We are desirous of impressing upon you that we do not wish the slightest advantage by reason of your change of mind on your Cosumnes hop purchases, but we do ask your consideration for a prompt and fair adjustment of the matter and we hope our above suggestion will meet your approval. [349]

No doubt you realize that your publishing the fact that you will not use Cosumnes hops greatly depreciates their market value and the greater such depreciation the greater your loss, and, therefore, it is far better in both your interest and ours that the market value of the Cosumnes hops be maintained.

There are plenty of brewers that are having successful results with our Cosumnes hops and it does not pay to influence their minds against them.

Faithfully,
E. CLEMENS HORST CO.
E. C. HORST,

Pres."

ECH/J.

On the ground that it was an offer of compromise, argumentative and self-serving declaration.

- 88. The Court erred in refusing to strike out the testimony of Lange concerning the overhead charges, insurance and the like because it was hear-say testimony. The substance being that certain entries made by others from transactions carried on by employees in the east showed certain charges.
- 89. The Court erred in refusing to strike out the testimony of Witness Horst concerning the existence of the 2000 bales belonging to defendant at the time of the breach, on the ground that he referred to records to show their whereabouts and refused to produce the records and testified that none were "earmarked" to identify them as defendant's property. Exception #61.
- 90. The Court erred in refusing to strike out the testimony of Witness Horst, with reference to the portion of the 3062 bales of hops, which were designated by him as Pabst goods, or being used by him for the purpose of completing the Pabst contract, because the substance of the testimony showed it was impossible to determine that there were 2000 bales on hand on November 4th, 1912, or what was the price paid for any hops available to be used to fill the Pabst contract and because simultaneously there were other goods in the 3062 bales then on hand sold for higher prices which were not in any way earmarked as belonging to others [350] but which were not included in the Pabst sale.
- 91. The Court erred in refusing to strike out all the testimony of Witness Peterson, on the ground that he did not claim to be a hop expert.
  - 92. The Court erred in overruling plaintiff's

objections to the testimony as to losses incurred for bad debts and uncollectible accounts, for goods claimed to have been sold on account of the Pabst Brewing Company, at the time the sales were made they were not made for the Pabst account but subsequently when the losses occurred, and plaintiff then claimed that they were Pabst's sale.

93. The Court erred in refusing to strike out the testimony as to loss by bad debts. Exception #36.

There was no particular 2000 bales set aside for the Pabst people and there was no evidence to show which of the 3000 bales which were on hand on November 4th, 1912, were designated as Pabst sales, so therefore it could not be determined whether or not the losses took place on them and whether or not the losses took place on goods first sold on other contracts, nor whether or not the people were able to pay, was hearsay testimony.

- 94. Also the Court erred in refusing to allow Witness Lange to tabulate a number of the 1912 airdried Cosumnes hops from plaintiff's ranch which had been rejected and the history of each of the bales that had been designated as Pabst goods showing where they were stored.
- 95. Also the Court erred in denying the motion to strike out all of the evidence of overhead charges depending upon items that were not shown to be directly connected with the 2000 bales of Pabst Brewing Company goods, or the goods that Horst set aside for Pabst Brewing Company, which had been designated to fill the order of Pabst Brewing

Company, because it was based on hearsay [351] evidence of the manner in which the expenses were incurred, irrelevant and immaterial and conclusion of the witness as to how much of each particular account should be charged and was absolutely based on matters that lay partly in law and partly in fact and calling for the information of the witness and question of law.

- 96. The Court erred in overruling the introduction of the calculations of the Witness Lange as to interest, storage, freight on tare, insurance, local freight, on the ground that it was not shown to be connected with the 2000 bales of hops that were used for the Pabst shipment, and based on hearsay evidence and were conclusions of the witness in matters of law.
- 97. The Court erred in refusing to strike out the answer to the following question asked Witness Lange:
- Q. What books did you have to examine to find the price at which the 2000 bales of Pabst hops were sold?
- A. I examined the books to find out to whom the hops were sold after November 4th, 1912. I figured out the average number of days. \* \* \* I went through the books and found the price at which we had sold the 2000 bales to other parties.

It is not responsive to the question, and is irrelevant and immaterial and necessarily based on hearsay evidence.

98. The Court erred in refusing to strike out the answer to the question.

Q. Did you figure any interest on losses as follows?

A. I figured the difference between the price we sold to Pabst and the price we sold to the other parties.

Because it is not responsive to the question and was necessarily hearsay, and also refusal to strike out portion of the answer to the same question reading as follows: [352]

"Most of the sales made of the 1,920 bales of the 2,000 bales were sold other parties after November 4th, 1912, were sold on delivery prices."

Because not responsive to the question and necessarily based on hearsay.

- 99. The Court erred in refusing to strike out the answer to the question:
- Q. What is the aggregate of the miscellaneous charges, storage, local freight, cartage, sampling, repairing and any other charges you could have vouchers for?

The answering being in substance as follows: "We know just what lot those items cover. It not being responsive to the question and being necessarily hearsay.

- 100. The Court erred in overruling the objection to the question asked Witness Lange:
- Q. What is the aggregate of miscellaneous charges consisting of storage, local freight, cartage, sampling and other charges like that which you could have vouchers to cover?

The substance of the answer being, that he figured interest at six per cent, the sale being the 1920 bales sold other parties after November 4th, 1912, on de-

livery prices and that there was various freight rates covering these sales; there was freight on tare and items of storage on hops on November 4th, on and there was one per cent discount allowed certain brewers and that there was certain bad accounts due and uncollectible, the difference between the amount of the invoices and the amount collected.

The same was necessarily based upon vouchers made by other persons concerning transactions of which the witness had no knowledge whatsoever and about which there was no testimony of [353] any person having any knowledge.

- 101. The Court erred in refusing to allow the defendant to cross-examine Witness Flint in the matter of whether certain hops were considered to be the best average hops of a district.
- 102. The Court erred in refusing to allow the defendant to cross-examine Witness Fielder in the matter of the state of the Horst crop as to ripeness at the time they were picked.
- 103. The Court erred in instructing Witness Sweeney to confine his testimony to air-dried Cosumnes hops.
- 104. The Court erred in making an order striking out the testimony of Witness Chalmers to the question:
- Q. What did you observe about the picking machine on the Horst ranch? and in saying, "You will find that he does not know anything about whether they went into these hops or not."
- 105. The Court erred in refusing to allow Witness Traganza to testify to what he saw concerning the

hop picking plant in operation at plaintiff's plant, in August, 1912.

106. The Court erred in striking out the testimony given by Witness Chalmers on the last day of the hearing, and stating that the witness did not know anything about what he was testifying to.

107. The Court erred in refusing to allow Mr. Traganza to testify as to the picking conditions.

108. The Court erred in permitting any testimony based upon the books of the plaintiff because there was no evidence introduced to show that the books were regularly kept. On the contrary, the evidence showed that many of the entries were made temporarily to be subsequently changed, and because none of the persons who made the entries in the Chicago and New York offices testified as to the correctness of the records, nor that the entries were made simultaneously, with the transactions, nor that they were [354] correct transcript of original entries made simultaneously on about the time of the transactions in question.

109. The Court erred in allowing any of the entries in the books until they were shown to have been made by some person who knew whether the expenses were incurred concerning bales which has been designated as part of the Pabst sale or other bales and for that reason none of the evidence concerning the entries made in the books because of reported from the Chicago and New York offices were material and the Court erred in permitting testimony to be introduced as to deductions drawn from the entries made through such reports.

- 110. The Court erred because it did not require plaintiff to first prove that the entries made in the books were made contemporaneous with the facts to which they related and that they were made by parties having personal knowledge of the fact who corroborated by their testimony that the entries were proper and because many of the entries were made from January to the first of June, 1913, at a time when but a very small portion of the Pabst so-called hops remained unsold, for instance, in the month of June, less than 16 bales remained unsold and yet the entire expense of the Chicago and New York offices were declared to be connected with the sale of said 16 bales and the expenses prorated in connection therewith.
- 111. The Court erred in permitting witnesses Lange and Horst, who were familiar with the work actually done and expenses actually made to determine what was the proper portion of prorating of the expenses of the offices in New York and Chicago as between so-called Pabst goods and other goods and the general carrying on of the Horst business.
- of the witnesses of plaintiffs Lange and Horst referring to the books without requiring [355] the books themselves to be introduced in evidence concerning the sales which plaintiff's witnesses testified to were made by the process of taking a portion of the air-dried hops which were on hand on November 4th, 1912, and applying them to contracts which were in existence theretofore, without permitting to defendant to introduce the prices thus obtained for

these goods so that the jury might have an opportunity of determining whether a reasonably careful man would have considered these sales as being on the Pabst account as against other sales, selected by plaintiff after the sales took place.

- 113. The Court erred in refusing to allow the testimony concerning the prices paid by plaintiff for Cosumnes hops which were not air-dried, but which were purchased by Horst in November, 1912, because Horst testified that some of the samples sent by him included in 25 to 38 were not air-dried, and all of the witnesses testified that the commercial value of air-dried Cosumnes and other Cosumnes were identical and Horst himself testified that he could not tell the difference between the air-dried and the kilndried Cosumnes hops when they were in the market.
- 114. The Court erred in permitting Witnesses Horst and Lange to testify concerning the expenses of the 1,300 bales which were claimed to have been sold on the Pabst account, because these witnesses were not shown to have had any data on which to base a proper prorating of the expenses for the sale of these particular goods with the other goods, some of which were of similar character and some of which were of dissimilar character, and because the necessary prorating carried with it conclusions of law as to the manner of application of expenses under the circumstances which existed at various times from November, 1912, to June, 1913. [356]
- 115. The Court erred in refusing to strike out the testimony of Witness Horst with reference to the price for which Pabst's 2,000 bales of goods were

sold because no portion of the 3,062 bales on hand November 4th, were designated as Pabst goods or as being used by him for the purpose of completing the Pabst contract and because, after all the goods were sold and 1760 bales being used to fill contracts which were in existence on November 4th, and more than a year after the sale, segregation was made imperatively selecting the sales at the lowest price as on Pabst account.

116. The Court erred in refusing to strike out the testimony of Witness Lange concerning the losses because of bad accounts, because the same were irrelevant and immaterial and based on hearsay evidence. The witness Lange knowing nothing about the conditions under which the sale took place and the manner of attempted collection.

Because it was not shown there was any particular 2,000 bales set aside for the Pabst people at the time Horst sold the goods to the persons whose accounts were subsequently claimed to be bad.

- 117. The Court erred in refusing to strike out the answer to the question asked Witness Horst, under the following circumstances:
- Q. As a matter of fact was not that manager of your New York office up to Montreal and spent a great portion of his time trying to sell goods up there in November, 1912?
- A. They were traveling around all the time. We took the expenses they incurred in traveling around all the time and apportioned them. All of the time they were trying to sell these hops.

The answer was not responsive to the question and

contained matter which was irrelevant and immaterial and based on hearsay evidence. [357]

118. The Court erred in refusing to strike out the answer to the question asked Witness Lange:

Q. What services, if any, did the stenographer perform, with reference to the Pabst goods, if you know of your own knowledge?

The answer being, "You are segregating an item according to the Pabst goods when all of the services were rendered for all of the goods that were sold at that time.

Counsel asked Witness Lange:

"Q. Do you know what services he performed, if any, with reference to the Pabst goods at that time?

The Court stated it would not make a particle of difference. Mr. Powers then saying: You have no means of knowing what those stamps were used for or what that exchange was for, of your own knowledge.

A. As far as I am concerned, I was not there watching the stamps go out, but I can say what the stamps were probably used for. They must have been used to pay postage on letters. Other than that I do not know.

Q. What connection did these expenses have to the 2,000 bales or the 16 bales that were left on hand at that time?

A. We did not apply them to any particular hops. This is a part of the expense for running the New York office.

Q. Of your own knowledge, you do not know what they are for?

The COURT.—I presume you are asking these questions for the purpose of moving to strike this out on the ground that he is testifying to hearsay.

Mr. POWERS.—Yes.

The COURT.—The motion is denied.

- Q. Your answer would be the same as far as all of the other items are concerned of the New York office, would it not? [358]
- A. In reference to my knowledge of the entries I know nothing about them other than these are expenses for running the New York office. These are expenses we paid to our men, and they came to us and we entered them in our books.
- 119. The Court erred when Witness Lange was asked the question.
- Q. Do you know personally what was done with reference to whether there was any segregation or not of any portion of those expenses for these particular Pabst goods or not?

The COURT.—It is not necessary for you to understand the question because Mr. Powers' previous examination has shown that you cannot know.

Q. All of your testimony with reference to these transactions during that period, regarding expenses of these eastern offices, is being given simply as a result of your examination of the books?

A. Entirely.

Mr. Powers, moving as follows: I move to strike out all of this witness's testimony on the ground that it is based on hearsay.

120. The Court erred in denying the motion that

all of the evidence of Witness Lange with reference to overhead charges be stricken out on the ground that it is dependent and is not shown to be in any way connected with the Pabst Company goods or the goods that Horst set aside for Pabst Brewing Company or designated to fill the order of Pabst Brewing Company and was based on hearsay evidence and was a conclusion of the witness as to the particular amount that should be charged to Pabst goods based upon the matters that lay partly in law and partly in fact and calling for the opinion of the witness, and after witness Lange had made the admission quoted in the last specification.

The substance of the testimony rejected was that the overhead [359] charges to sell 3,062 bales of Cosumnes hops which were on hand in November, 1912, should be prorated in such a way that \$4,459.30 should be charged against the defendant because of storage, insurance, bad debts, bookkeeping, traveling expenses, stenographer, Christmas presents, and other charges of that character.

- 121. The Court erred in allowing the conclusion of the witness as to interest, storage, freight on tare, insurance and local freight because the same were immaterial and incompetent as they were not in any way connected with any hops that were set aside for the Pabst people nor any testimony of any person familiar with the facts as to any of the charges that were entered in the books.
- 122. The Court erred in refusing to allow witness Horst to get data as to rejections of hops made by the Pabst Brewing Company, offered in rebuttal of

his testimony that the Pabst people had been in the habit of making rejections.

- 123. The Court erred in refusing to strike out the testimony of the Witness Horst in reference to the 2,000 bales belonging to Pabst on the ground that his only knowledge of sales was by reference to records of sales not made by the witness himself, and with which he had no connection and which were not properly in evidence.
- 124. The Court erred in the ruling to a question asked Witness Lange:
- Q. You say there was a certain 2,000 bales of hops on November 4th, 1912, in certain warehouses. Will you show me the record of the warehouses of those bales on November 4th, 1912?
- A. I can show you some of the records. They are in several books. We did not bring them all here. I started out to do that with Mr. Farrell. [360]

Mr. POWERS.—I move to strike out the answer as not responsive to the question.

The COURT.—The answer is responsive to the question. I do not propose to permit you at this time to go into a detailed examination of all of these entries. You may pick out one or two items. I have no disposition to keep anything from you that you have called for in the proper way, but the Court has got to protect itself and the jury against the delay that would insue from an examination of things of this kind in the courtroom that should have been examined outside.

Mr. POWERS.—I except the statement of the Court, because my understanding of the law is that

when entries in books are referred to, that we have a right to examine those books.

125. The Court erred in denying defendant's motion to strike out the testimony of Witness Lange as to the shipment of goods after they arrived in Chicago and New York, because the testimony was all necessarily hearsay.

The substance of the testimony rejected was that some 1,300 bales of hops were shipped to various places in Chicago and New York, and that expenses were incurred aggregating over \$5,000 on them thereafter, and that prices were obtained ranging from 12 to 18 cents and none of these transactions were carried on by the witness and the witness was not present when any of the charges were made or any of the transactions took place.

- 126. The Court erred in refusing to allow Witness Sweeney to testimony concerning whether or not Pabst Brewing Company had the reputation of rejecting goods and although Mr. Powers offered to prove that the only goods ever rejected by Pabst were the Horst goods. (Exception #81.)
- 127. The Court erred in refusing to allow Witness Chalmers to [361] testify, after Mr. Powers had made an offer that he would prove by him that he was present while the hops which were the subject of the testimony of Witnesses Horst and Lange were being baled and that he saw the leaves and stems being put into the drier and that subsequently those hops were baled as they were there, and that he actually saw the stems and leaves go into the hops with his own eyes. (Exception #64.)

The Court said. You will find that he does not know anything about whether they went into these hops or not. That is so in the nature of things, he cannot say.

128. The Court erred in refusing to allow the testimony of Witness Chalmers concerning the leaves and stems going into the hops which were being dried because the testimony showed that all of the hops thus being dried were plaintiff's air-dried Cosumnes hops, that 11 of the bales were being handled in the same way and Witness Horst had testified that with the exception of a small number of bales which were separately clean, that the remaining bales were all baled in the same way and sold in the same way and consequently any way which showed the manner of the leaves and stems entered into the bales was material evidence for the Court to know.

129. The Court erred in refusing to allow the man who had charge of the picking machine for plaintiff's corporation to introduce any evidence. The corporation must necessarily act through agents and the agent in charge made certain statements as to the manner of picking hops in question, and for that reason his statements were entirely material and binding on the corporation.

130. The Court erred in refusing to allow the evidence offered by Witness Chalmers with reference to the state of the hops picked [362] by plaintiff in August, 1912, concerning greenness and unripeness, because the testimony of the witness was that the hops in the samples 1 to 20 were unripened and this evidence tendered to corroborate the evidence

of the other witnesses and to contradict the statements of plaintiff's witnesses, that the hops were picked properly and were proper in color and were choice.

- 131. The Court erred in striking out the testimony of Witness Chalmers on the subject of the stems and the statement of the party in charge of the picking machine and as to greenness of the hops because all thereof was material as corroborative of the expert testimony of defendant's witnesses and rebuttal of the testimony of plaintiff's witnesses.
- 132. The Court erred in permitting the testimony as to custom with reference to time of delivery because there was a definite fixed time for deliveries made by Horst in one instance and was recognized by him in a draft of a contract submitted by him to defendant.
- 133. The Court erred in refusing to allow any testimony except as to air-dried Cosumnes hops because the contract as finally confirmed referred to hops equal to samples 21 to 24, and the contemporaneous interpretation of the contract by both parties was that any hops equal to those samples should be accepted, and Witness Horst testified that the samples 25 to 38 which were not air-dried, and Witness Lange testified that he did not think they were all air-dried Cosumnes hops.
- 134. The Court erred in submitting to the jury the question of whether or not the original contract made by the first telegrams in the year 1911 was not modified by subsequent letters and telegrams in 1912, because it was a question of law as to whether or not

the said contract had been modified and not one for the jury. [363]

- 135. The Court erred in permitting the Witness Horst to testify by the use of extracts from books in tabulated form, and permitting Witness Lange to testify from the contents of the books none of which were produced in evidence and in ruling that the defendant was compelled to verify the facts from cross-examination after they had been given an opportunity of examining the books.
- 136. The Court erred in permitting the Witness Horst to testify as to the sale price of goods which were held by plaintiff for defendant because there was no evidence to show that any specific goods were those held and because also the evidence of sales and all prices obtained from sales of these goods were only known to said Horst by examination of vouchers and statements of third parties about which he had no personal knowledge.
- 137. The Court erred in overruling the objection to question asked Witness Horst: Were you able or not to deliver out of the 4,300 bales you have specified, the 2,000 bales of hops for the purpose of filling the contract for Pabst Brewing Company, of the quality which the contract called for? Which was modified by the Court adding thereto "of the quality which the contract called for."

The question was irrelevant, incompetent and immaterial, and referred to matters in which *the* defendant was in no way connected;

The question was answered in substance as follows:

Yes, the samples sent to them were choice, airdried Cosumnes hops and they were from these bales.

- 138. The Court erred in denying the motion to strike out the testimony of Witness Peterson, that the samples of hops from the Horst ranch shown him, were choice hops, because it called for the conclusion of the witness, and the witness was not shown to be an expert on the subject and admitted that he did not [364] claim to be such an expert.
- 139. The Court erred similarly in refusing to strike out the testimony of the other farmers who testified as to the character of the hops from samples. None of them claimed to be experts.
- 140. The Court erred in overruling the objection to the question asked Witness Lange: "Beginning on November 4th, 1912, until you finished selling the remainder of the bales, about 1,300 and some odd bales, were there certain expenses incurred in New York and Chicago and Eastern States in selling the remainder of the 2,000 bales of what we call the Pabst hops and other hops?

The question was answered in substance, as follows:

Yes, sir. That appears on the books of the company. The evidence was absolutely hearsay and not based on any facts known to the witness. (Exception #39.)

141. The Court erred in overruling the objection to the question asked Witness Lange: "Did the corporation of E. Clement Horst Company pay these expenses and these salaries based on those statements?

The question was answered in the affirmative: That they were paid before the suit was commenced in the ordinary course of business.

142. The Court erred in allowing in evidence calculations of Witness Lange on interest, storage, freight on tare, insurance, local freight. (Exception #58.)

The substance of the testimony being that these items amounted to \$4,459.30 chargeable on goods sold on account of defendant. As the calculation was made an entries of transactions about which witness knew nothing. They were hearsay.

143. The Court erred in refusing to allow Witness Horst to state where the 4,500 bales produced by his company were stored. [365]

The rejected testimony in substance would have been the starting point to show that the goods were once stored and then shipped out prior to November 4th, 1912, and were not on hand to fill defendant's order on that date.

144. The Court erred in sustaining the objection to the question asked Witness Horst: Q. What bales of Cosumnes hops had you then (November 4th, 1912) already set aside for contracts then in existence?

The rejected testimony would have been that no bales of Cosumnes hops had been set aside at that time at all, and that all of the Cosumnes hops which were subsequently used in contracts were charged to Pabst account a short time before the suit was commenced. (Exception #67.)

145. The Court erred in sustaining the objection

to the question asked Witness Horst: Q. Will you give me deliveries and dates of delivery of Cosumnes goods that you made on your contracts which were in existence at the time of the commencement of the season of 1912?

The rejected evidence would have shown that plaintiff delivered Cosumnes goods on 'these contracts, which were then in existence and after this suit was commenced and a short time before the trial of the case that such of the contracts as sustained a loss were treated as Pabst goods, and such of the contracts as were sold at prices above that sold to Pabst, were considered as sales belonging to plaintiff and in that way defendant was made responsible for losses on contracts which plaintiff had in hand and as a matter of fact plaintiff did not have 2,000 bales on hand on November 4th.

146. The Court erred in denying defendant's motion to strike out testimony as follows: [366]

We took all of the sales of Cosumnes River hops that we made, exclusive of the clean ups, after November 4th. That made 1,500 bales, or a little over. That made a certain average price. Instead of putting the balance of the hops to make the 2,000 at that same average price, we put them in at the higher average price, being the lowest sales on the contracts. We had contract deliveries for a large quantity of hops. We had advance contracts for 20 or 30 thousand bales of hops, of Pacific Coast hops, but the average of the 1,500 bales made a certain figure. The 1,500 bales that we sold subsequent to November 4th. So instead of putting on 500 bales, on the aver-

age of the 1,500 bales, I put on those 500 bales at a price higher than the average was, so that there could be no question about the amount of damages.

The motion being as follows:

Mr. POWERS.—I move to strike out the testimony of the witness just given on the ground that it does not appear that any portion of these 3,062 bales were in any way disigned as Pabst goods, or as being used by him for the purpose of completing the Pabst contract, and because in addition thereto, there was certain other goods that were sold, that were available to be used by him for fulfilling the Pabst contract at an entirely different price than that given by him, and we have not the evidence of that. (Exception #69.)

147. The Court erred in allowing the question asked Witness Horst on rebuttal: Q. In your testimony, I asked you certain questions as to your ability to deliver 2,000 bales of hops equal to the samples 1 to 20. I now ask you if, on November 4th, 1912, you had 2,000 bales of hops on hand equal in quality to samples 21 to 24.

The witness had already testified as to the same matter in chief, and showed that he did not have that number of bales on [367] hand at that time, but in the rebuttal he answered in the affirmative.

148. The Court erred in interrupting Attorney Powers while arguing for the defendant and striking out the testimony of Witness Chalmers concerning the greenness of the character of the hops at the time they were picked by the plaintiff.

WHEREFORE the said defendant prays that the

judgment in favor of plaintiff herein and against the defendant be reversed and that said District Court of the United States, in and for the Northern District of California, Second Division, be directed to grant a new trial in said cause.

HELLER, POWERS & EHRMAN,

Attorneys for Plaintiff in Error (Defendant in Court Below),

[Endorsed]: Filed Feb. 4, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [368]

United States Circuit Court of Appeals, for the Ninth Circuit.

E. CLEMENS HORST COMPANY (a Corporation),

Plaintiff,

VS.

PABST BREWING COMPANY (a Corporation),
Defendant.

### Order Allowing Writ of Error.

Upon motion of Heller, Powers & Ehrman, attorneys for defendant in the above-entitled action, and upon the filing of the petition for writ of error and assignment of errors,

IT IS HEREBY ORDERED that a writ of error as prayed for in said petition be allowed and that the amount of the supersedeas bond to be given by the defendant upon said writ of error be and the same is hereby fixed at the sum of Twenty-five thousand (25,000) Dollars, and that upon the giving of

said bond all further proceedings in this court be suspended, stayed and superseded pending such determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 4th, 1915.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Feb. 4, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [369]

United States Circuit Court of Appeals for the Ninth Circuit.

E. CLEMENS HORST COMPANY (a Corporation),

Plaintiff,

VS.

PABST BREWING COMPANY (a Corporation),
Defendant.

#### Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Pabst Brewing Company, as principal, and the American Surety Company of New York, a corporation, as surety, are jointly and severally held and firmly bound unto the plaintiff in the above-entitled action in the sum of Twenty-five Thousand (\$25,000) Dollars, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally and each of our successors, representatives and asigns firmly by these presents.

Sealed with our seals and dated this 26th day of January, 1915.

The condition of this obligation is such, that whereas, the above-named defendant is about to sue out a writ of error in the United States Circuit Court of Appeals, in and for the Ninth Circuit, to reverse the judgment entered in the above-entitled action in favor of the plaintiff therein and against the defendant therein, and awarding judgment in favor of the plaintiff therein for the sum of \$22,625.30, and for costs in the sum of \$252.80.

NOW, THEREFORE, if the above-named defendant, Pabst Brewing Company, a corporation, shall prosecute such writ of error to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect. [370]

IN WITNESS WHEREOF, the said corporations have caused their names and seals to be hereto affixed by their officers thereunto duly authorized, this 26th day of January, 1915.

PABST BREWING COMPANY.

[Seal]

By I. W. HENNING,

Vice-Prest.

AMERICAN SURETY COMPANY OF NEW YORK.

By D. ELMER DYER, Resident Vice-President.

[Seal] Attest: By V. H. GALLOWAY, Resident Assistant Secretary. The foregoing bond is hereby approved this 4th day of February, 1915.

WM. C. VAN FLEET, Judge.

[Endorsed]: Filed Feb. 4, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [371]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation, Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

Certificate of Clerk U. S. District Court to Record on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing three hundred seventy-one (371) pages, numbered from 1 to 371, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$230.20; that said amount was paid by Heller, Powers & Ehrman, attorneys for the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of August, A. D. 1915.

[Seal] WALTER B. MALING,

Clerk U. S. District Court, Northern District of California.

[Ten Cent Internal Revenue Stamp. Cancelled Aug. 19, 1915. W. B. M.] [372]

### [Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Pabst Brewing Company, a corporation, plaintiff in error, and E. Clemens Horst Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Pabst Brewing Company, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things

concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 4th day of February, in the year of our Lord One Thousand, Nine Hundred and Fifteen.

[Seal] WALTER B. MALING, Clerk of the United States District Court, Northern District of California.

> By J. A. Schaertzer, Deputy Clerk.

Allowed by

WM. C. VAN FLEET, United States District Judge. [373]

#### Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

[Endorsed]: No. 15,678. United States District Court for the Northern District of California, Second Division. Pabst Brewing Co., a Corp., Plaintiff in Error, vs. E. Clemens Horst Co., a Corp., Defendant in Error. Writ of Error. Filed Feb. 4, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

### [Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to E. Clemens Horst Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein Pabst Brewing Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ

of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 4th day of February, A. D. 1915.

### WM. C. VAN FLEET, United States District Judge. [374]

[Endorsed]: No. 15,678. United States District Court for the Northern District of California, Second Division. Pabst Brewing Co., a Corp., Plaintiff in Error, vs. E. Clemens Horst Co., a Corp., Defendant in Error. Citation on Writ of Error, and Admission of Service Thereof. Filed Feb. 13, 1915. W. B. Maling, Clerk. J. A. Schaertzer, Deputy Clerk.

Due service and receipt of a copy of the within citation is admitted this 8th day of February, 1915.

# W. H. CARLIN, DEVLIN & DEVLIN, Attorneys for Defendant in Error.

[Endorsed]: No. 2639. United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company, a Corporation, Plaintiff in Error, vs. E. Clemens Horst Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of

Error to the United States District Court of the Northern District of California, Second Division. Filed August 20, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer, Deputy Clerk.

### [Order Extending Time to May 1, 1915, to File Record in Appellate Court, etc.]

United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY (a Corporation),
Plaintiff in Error,

VS.

E. CLEMENS HORST COMPANY (a Corporation),

Defendant in Error.

It appearing that the plaintiff in error (defendant in the court below) has prepared and served a proposed Bill of Exceptions to the rulings of the Court and Judge made at the trial and that the time of the defendant in error (plaintiff in the court below) to propose amendments thereto has been extended to the first day of March, 1915, and that the said Bill of Exceptions when settled and engrossed will be a necessary part of the record to be returned to this court, and good cause, therefore, being shown for the making of this order,

IT IS ORDERED that the time within which the plaintiff in error may file the record and docket the case with the clerk of this court, be and the same is hereby enlarged to and including the first day of May, 1915.

Dated February 10th, 1915.

WM. C. VAN FLEET, Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company (a Corporation), Plaintiff in Error, vs. E. Clemens Horst Company (a Corporation), Defendant in Error. Order Enlarging Time. Filed Feb. 10, 1915. F. D. Monckton, Clerk.

### [Order Extending Time to May 15, 1915, to File Record in Appellate Court, etc.]

United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY (a Corporation),
Plaintiff in Error,

VS.

E. CLEMENS HORST COMPANY (a Corporation),

Defendant in Error.

It being shown to the satisfaction of the Court that the proposed Bill of Exceptions heretofore served by the plaintiff in error to the rulings of the Court and the Judge made at the trial and the proposed amendments of the defendant in error thereto are in course of settlement by agreement between the parties, and that the plaintiff in error has submitted to the defendant in error an engrossed copy of the said Bill of Exceptions as amended for the purpose of obtaining the assent of the defendant in error thereto, and that the engrossed bill probably cannot be presented to the trial judge for settlement and signature before the 15th day of May, 1915, and that the said bill of exceptions when settled and signed will be a necessary part of the record to be returned to this Court, and good cause therefor being shown for the making of this order,

IT IS ORDERED that the time within which the plaintiff in error may file the record and docket the case with the clerk of this court, be and the same is hereby enlarged to and including the 15th day of May, 1915.

Dated April 27th, 1915.

WM. C. VAN FLEET,

Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company (a Corporation), Plaintiff in Error, vs. E. Clemens Horst Company (a Corporation), Defendant in Error. Order Under Rule 16 Enlarging Time to Aug. 30, 1915, to File Record Thereof and to Docket Case. Filed Apr. 27, 1915. F. D. Monckton, Clerk.

### [Order Extending Time to June 1, 1915, to File Record in Appellate Court, etc.]

United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY (a Corporation), Plaintiff in Error,

VS.

E. CLEMENS HORST COMPANY (a Corporation),

Defendant in Error.

It being shown to the satisfaction of the Court that the proposed Bill of Exceptions heretofore served by the plaintiff in error to the rulings of the Court and the Judge made at the trial and the proposed amendments of the defendant in error thereto are in course of settlement by agreement between the parties, and that the plaintiff in error has submitted to the defendant in error an engrossed copy of the said Bill of Exceptions as amended for the purpose of obtaining the assent of the defendant in error thereto, and that the engrossed Bill probably cannot be presented to the trial judge for settlement and signature before the 1st day of June, 1915, and that the said Bill of Exceptions when settled and signed will be a necessary part of the record to be returned to this Court, and good cause therefor being shown for the making of this order.

IT IS ORDERED that the time within which the plaintiff in error may file the record and docket the case with the clerk of this court, be and the same is hereby enlarged to and including the 1st day of June, 1915.

Dated May 12th, 1915.

WM. C. VAN FLEET, Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company, a Corporation, Plaintiff in Error, vs. E. Clemens Horst Company, a corporation, Defendant in Error. Order Extending Time to File the Record and Docket Case With Clerk. Filed May 13, 1915. F. D. Monckton, Clerk.

### [Order Extending Time to July 1, 1915, to File Record in Appellate Court, etc.]

United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY (a Corporation),
Plaintiff in Error,

VS.

E. CLEMENS HORST COMPANY (a Corporation),

Defendant in Error.

IT BEING SHOWN to the satisfaction of the Court that the proposed Bill of Exceptions heretofore served by the plaintiff in error to the rulings of the Court and the Judge made at the trial and the proposed amendments of the defendant in error thereto are in course of settlement by agreement between the parties, and that the plaintiff in error has submitted to the defendant in error an engrossed

copy of the said Bill of Exceptions as amended for the purpose of obtaining the assent of the defendant in error thereto, and that the engrossed Bill of Exceptions probably cannot be presented to the trial judge for settlement and signature before the 15th day of June, 1915, and that the said Bill of Exceptions when settled and signed will be a necessary part of the record to be returned to this Court, and good cause therefor being shown for the making of this order,

IT IS ORDERED that the time within which the plaintiff in error may file the record and docket the case with the clerk of this court, be and the same is hereby enlarged to and including the 1st day of July, 1915.

Dated May 28th, 1915.

WM. W. MORROW,

Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company (a Corporation), Plaintiff in Error, vs. E. Clemens Horst Company (a Corporation), Defendant in Error. Order Enlarging Time Within Which Plaintiff in Error may File Record and Docket the Case. Filed May 29, 1915. F. D. Monckton, Clerk.

## [Order Extending Time to July 31, 1915, to File Record in Appellate Court, etc.]

United States Circuit Court of Appeals for the Ninth Circuit.

PABST BREWING COMPANY, a Corporation, Plaintiff in Error,

VS.

E. CLEMENS HORST COMPANY, a Corporation, Defendant in Error.

Good cause appearing therefor, it is hereby ordered that the plaintiff in error may have to and including the 31st day of July, 1915, in which time to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated June 30, 1915.

WM. W. MORROW, Circuit Judge.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to July 31, 1915, to File Record Thereof and to Docket Case. Filed Jun. 30, 1915. F. D. Monckton, Clerk.

## [Order Extending Time to Aug. 30, 1915, to File Record in Appellate Court, etc.].

In the United States Circuit Court of Appeals, for the Ninth Circuit.

PABST BREWING COMPANY, a Corporation, Appellant,

VS.

# E. CLEMENS HORST COMPANY, a Corporation, Appellee.

Good cause appearing therefor, it is ordered that the appellant may have to and including August 30th, 1915, within which to file its record on appeal and to docket the cause in the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated July 29, 1915.

#### WM. W. MORROW,

Judge of the United States Circuit Court of Appeals.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Pabst Brewing Company, a Corporation, Appellant, vs. E. Clemens Horst Company, a Corporation, Appellee. Order Extending Time to File Record on Appeal and to Docket the Cause. Filed Jul. 29, 1915. F. D. Monekton, Clerk.

No. 2639. United States Circuit Court of Appeals for the Ninth Circuit. Six Orders Under Rule 16 Enlarging Time to Aug. 30, 1915, to File Record Thereof and to Docket Case. Refiled Aug. 20, 1915. F. D. Monckton, Clerk.

IN THE

### United States Circuit Court of Appeals

For the Ninth Circuit

PABST BREWING COMPANY (a corporation),

Plaintiff in Error.

VS.

E. CLEMENS HORST COMPANY (a corporation),

Defendant in Error.

### BRIEF FOR PLAINTIFF IN ERROR.

Heller, Powers & Ehrman, Attorneys for Plaintiff in Error.

Thomas J. Geary,
James L. Robison,
Of Counsel.

Filed this......day of October, 1915.

FRANK D. MONCKTON, Clerk.

to the description

By Deputy Clerk.



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IN THE

### United States Circuit Court of Appeals

For the Ninth Circuit

PABST BREWING COMPANY (a corporation),

Plaintiff in Error,

VS.

E. CLEMENS HORST COMPANY (a corporation),

Defendant in Error.

#### BRIEF FOR PLAINTIFF IN ERROR.

Defendant in error is a New Jersey corporation dealing in hops, both as a grower and as a merchant, buying from growers and selling to brewers. It has hop-yards in several parts of the State of California, and also in the State of Washington. E. Clemens Horst is its president, manager and principal owner. Its main California office is in San Francisco. Pabst Brewing Company is a Milwaukee corporation carrying on a general brewing and selling beer in various parts of the United States, including the State of California.

This action was brought by defendant in error against plaintiff in error to recover \$32,000 damages for alleged breach of contract to accept and pay for 2000 bales of hops of the 1912 crop.

Plaintiff in error filed a cross-complaint alleging that defendant in error agreed to sell them goods of the character of certain samples and had failed to do so and that plaintiff in error was thereby compelled to buy hops to fill their requirements and that thereby they were damaged in the sum of \$2500.

The verdict was in favor of Horst Company for \$22,625.30.

For brevity sake and to prevent the usual confusion in the use of names describing the parties, which results where plaintiff in the lower Court has become defendant in error, we will refer to plaintiff in error as the Pabst Company and defendant in error as the Horst Company.

Hops are prepared for market by first picking them and storing them in a house called a drying house. They are therein dried by the application of artificially heated air (p. 95). The Horst Company had a peculiar method of applying the hot air necessary to dry the hops; that is to say, it heated the air outside the building and forced the hot air within the containing building into the chamber containing the hops in order to dry the green hops; while all other growers heated the air within the containing building and applied the air within the containing building (p. 55).

Horst attempted to establish a distinguishing term for hops cured by his process and himself used the name "air dried" for that purpose. He, himself, and all other experts testified that no one (not even Horst himself) could distinguish hops after drying as to whether they had been submitted to the so-called "air dried" process or not (p. 101). And all experts except Horst testified that there was no term "air dried" used in the hop trade to distinguish hops of the so-called "air dried" process (pp. 90, 95).

Cosumnes hops—are those grown in a district near the Cosumnes River, Sacramento County, California. The largest shipping point and usual market place for hops near it being Sacramento City.

The Horst Company claims the transaction was closed by a series of letters and telegrams whereby the Pabst Company bought 2000 bales of a peculiar "air dried" Cosumnes hops. The Pabst Company claims that the word "air dried" used in these negotiations was not meant as a distinctive term and that the said negotiations did not come to a binding contract because when preliminary telegrams ceased, each party sent to the other a draft of a contract wherein each inserted numerous conditions additional to those referred to in the telegrams and agreements as to the time of delivery entirely different from each other and neither party accepted the draft of contract offered by the other and both abandoned the correspondence without either draft of

contract being accepted or any signed contract being executed.

The parties entered into new negotiations in 1912, which superseded the 1911 negotiations and thereby finally an agreement was made, viz.: The Horst Company agreed to sell hops equal in quality to four samples (21 to 24) of Cosumnes hops (which were not "air dried") forwarded by Pabst Company to Horst Company as type samples and Pabst agreed to buy same at 20c and freight and in that way the importance of the term "air dried" was entirely eliminated.

Before the type samples were forwarded Horst Company had forwarded to Pabst Company samples 1 to 20 which were entirely the product of the Horst Ranches by his "air dried" process. After the forwarding of the type samples Horst Company forwarded to Pabst Company samples 25 to 38 which were not all of the Horst "air dried" character but were Cosumnes hops of a character which Horst Company contended were equal in quality to the type samples.

# A Statement of the Facts of the Case Can Be Given Incidentally as the Errors Are Pointed Out.

During the trial of the case the following errors arose, viz.:

### AS TO ERROR BECAUSE TESTIMONY CONFINED TO "AIR DRIED" HOPS.

1. The Horst Company adopted the theory that the contract referred to hops cured in their peculiar way and that no other hop grower which Horst Company called "air dried".

Mr. Horst, its president, admitted that the socalled "air dried" hops were exactly similar in appearance to all other hops when offered to the public (p. 101).

Horst Company alone used the peculiar process by its president called "air dried" process.

All the experts *including* Mr. Horst agreed that after the hops were cured no one was able to distinguish those which had been cured by the "air dried" process from those which had been cured by the other process (p. 101).

Horst testified (p. 108):

"I cannot tell the difference between 'air dried' Cosumnes and 'kiln-dried' Cosumnes hops after they are dried. To look at them you could not tell the difference."

All except Mr. Horst agreed that no such distinction or term was known to the trade (pp. 95, 257, 270, 280).

The word "air dried" is nothing more nor less than a term used by Mr. Horst to describe a process. He testified at page 108 as follows:

"Q. When you speak about air-drying it provides for the manner in which the crop is cured?

A. It refers to the manner of curing the

crop

The Court. In other words, air-drying does not refer to the particular character of the hops that is grown.

A. No, sir.

Q. It simply refers to the mode or method

or manner of curing it?

A. That is all. \* \* \* I cannot tell the difference between air-dried Cosumnes and kilndried Cosumnes hops after they are dried. To look at them you could not see the difference."

The Court in the trial of the case adopted the Horst Company's theory and prevented the introduction of testimony on facts as to prices and quality of other Cosumnes hops to the great damage of the Pabst Company's case.

No person except the Horst Company's employees had ever had any dealings with the so-called "air dried" hops, knowing them to be such.

All persons in the hop business were unable to distinguish the so-called "air dried" hops from other hops after they were cured; and only Mr. Horst and his employees knew which hops on the market were that particular kind of hops and they, only because of artificial extrinsic adjuncts such as the bags in which they were contained or the wrappers, which were not marked "air dried".

All the hop experts except Mr. Horst testified that there was no term "air dried" hops used in the hop trade; and that all hops were "air dried" and that these two words were no more descriptive of the character of a hop nor its appearance when on the market or for purposes of selling than would have been the words "on a vine grown"

or "in a hop house dried" or hops "that were once in an automobile truck in Sacramento".

Nevertheless, the Court limited all evidence as to value and character of hops to the so-called peculiar "air dried" hops or practically of hops grown by Horst Company alone, and only allowed witnesses to testify directly as to quality or price, who knew about the so-called "air dried" hops.

This ruling practically limited deliveries on the purchase to hops grown by Horst himself; and limited testimony as to quality to Horst and his employees.

AS TO REJECTION OF TESTIMONY OF EXPERTS WHO DID NOT KNOW HORST HOPS BY THE APPELLATION "AIR DRIED".

Experts who were familiar with the Sacramento market but who did not know "air dried" hops of the character referred to by Horst Company as such, were produced by Pabst Company on questions of value and price and the Court refused to allow them to testify as to the value and sale price of hops in November, 1912, unless their testimony referred to "air dried" hops of the peculiar Horst process.

This practically prevented Pabst Company obtaining any experts because none but Horst Company's employees knew which hops on the market were the so-called "air dried" hops although all looked exactly alike and were commercially the same.

THE WRITTEN DOCUMENTS THEMSELVES SHOW THAT NO IMPORTANCE WAS GIVEN TO THE WORDS "AIR DRIED" BY THE PARTIES AND THAT THE FINAL CLOSING TRANSACTION DID NOT IN ANY WAY REFER TO "AIR DRIED".

The transactions in question commenced by Horst Company included in a day letter to Pabst Company August 24, 1911, concerning the sale of some 1911 hops an offer as follows:

"We offer thousand air dried cosumnes Twelve at Twenty plus freight" (p. 48).

To this Pabst Company replied on August 26, 1911, by regular telegram:

"Will take thousand bales Cosumnes twelves strictly choice quality twenty cents fob Milwaukee" (p. 49).

It will be observed that this reply does not refer to "air dried" hops, but to strictly "choice quality".

To this telegram last referred to Horst Company replied by night lettergram dated August 25, 1911, to the Pabst Company:

"We offer one thousand bales twelves choice air dried Cosumnes delivered Milwaukee at twenty cents plus freight this is positively best we can do we expect to run about thirty cents coast" (p. 49).

To this Pabst Company replied under date of August 26, 1911:

"We accept offer one thousand bales choice cosumnes air dried ninteen twelve crop twenty cents fob" (pp. 49, 50).

It will be noted that in this telegram Pabst Brewing Company for the first time do use the same language as plaintiff "choice air dried".

On August 27, 1911, Horst Company telegraphed Pabst Company confirming the sale of this one thousand bales and added:

"Offer you additional thousand bales at same price also offer you subject our confirmation of sale additional thousand bales eleven crop at forty cents delivered at Milwaukee freight paid. Our offer on twelve crop from your standpoint is exceptionally low one. As our sales of twelve crop increase will increase price accordingly only able to make you this low offer because of our unsold surplus" (p. 51).

To this night lettergram Pabst Company wired Horst Company on August 28, 1911:

"We accept your offer one thousand bales strictly choice Cosumnes nineteen twelve crop at twenty cents fob please confirm" (p. 50).

THE COURT WILL NOTE THAT NOTHING IS SAID IN THIS LAST TELEGRAM ABOUT "AIR DRIED", BUT THAT THE WORDS "STRICTLY CHOICE" ARE THE ONLY QUALIFYING ADJECTIVES INSERTED TO THE WORD "COSUMNES".

On August 29, 1911, Horst Company telegraphed to Pabst Company:

"We confirm sale to you of another one thousand bales choice nineteen twelve crop cosummes at twenty cents delivered Milwaukee plus freight charges making total sales to you of nineteen twelve crop two thousand bales" (p. 50).

The Court will observe that in this telegram Horst Company itself says nothing about "air dried" and does accept Pabst Company's language concerning quality, to wit: "choice".

Upon September 4, 1911, Horst Company wrote to Pabst Company referring to this transaction and saying:

"Enclosed herewith we hand you contracts in triplicate for the two lots of 1000 bales Choice Pacific Coast 1912 crop Air Dried Cosumnes Hops, as per telegraphic sales made you on August 26th, and August 29th, respectively.

Please be good enough to sign all three contracts of each set and return two of such set to us

If you do not wish the sharing clause (clause 18) of the contract, please strike it out, and in the case the elimination of that clause will be satisfactory to us" (p. 315).

This offer of contract was received by Pabst Company. The tendered contracts in triplicate contained very many new conditions such as

"The seller agrees to sell to the buyer 1000 bales hops about equal to or better than choice Brewing Pacific Coast Air Dried Cosumnes Hops" (p. 316). "Time of shipment \* \* \* during months inclusive of September to December following harvest \* \* \* with such extra time as provided in paragraphs 12 to 16" (p. 317). "Difference, if any, between quality sold and quality hereunder shall entitle Buyer to equivalent allowance but not to rejection of delivery" (p. 319).

This offer was never accepted by Pabst Company, and the draft of contract was never signed by Pabst Company.

On the contrary on September 8, 1911, Pabst Company wrote to Horst Company a so-called purchasing order sent in duplicate, reading as follows (p. 112):

"PURCHASE ORDER

No. 54808 Req. " C.Z.

Dept.

Pabst Brewing Co.

Milwaukee, Wis., Sept. 8, 1911.

E. Clemens Horst Co.,

San Francisco, Cal.

Please forward the following to Chestnut St., Dept via C. M. & St. P. These goods must reach us Shipments to be made during October, November, December, January and February.

2000 bales choice air dried Cosumnes Cali-

fornia Hops,

Crop 1912 at 20¢ per pound f.o.b. Coast. We insist on submission of samples and approval thereof before shipments are made.

Mail bill at once, putting purchase order number thereon.

Also mail Bill of Lading with weight and through freight rate. All goods are received subject to our count or weight and inspection. Terms: Cash, less 2 % 10 days after goods are delivered or on or before 10th of Month following purchase; otherwise settlements are made on the 22nd of each month following purchase of goods.

All freight charges must be prepaid.

If you cannot ship so that goods will reach us on the day specified above, notify us at once, giving date on which you can ship.

Pabst Brewing Co.,

H. J. Stark, Secretary."

Pabst Company claim that these orders were retained by Horst Company and never were returned them.

But Horst Company claims they were returned with a letter, and offered in evidence a copy of said letter dated September 12, 1911, in which they say (p. 215):

"Sept. 12th, 1911.

Pabst Brewing Co., Milwaukee, Wis.

Gentlemen:

Enclosed herewith we return you purchase orders #54807/8 covering 500/B/01911 Air Dried Cosumnes Hops and 2000 B/01912 Air Dried Cosumnes Hops.

We have already sent you Hop contracts signed by us and covering the above, and are now awaiting their return when signed by you.

Yours faithfully,

ECH/J E. CLEMENS HORST Co., Encls. E. C. Horst."

But Horst Company does not claim that the draft of hop contracts sent by them referred to in the last paragraph of said letter was ever executed by Pabst Company.

Consequently, whichever way the question as to the forwarding of this letter be decided, the testimony remains undisputed that Pabst Company never accepted the draft of hop contract as sent by Horst Company and the only offer of a contract ever tendered by Pabst Company to Horst Company was that tendered in the so-called purchase orders which were not acted on by the Horst Company and which it claims to have returned unsigned on September 12, 1911.

In either event the undisputed testimony shows that on September 12, 1911, the minds of the parties had not met as to the terms of any contract.

The transactions then remained in status quo until a year afterwards when under date of September 27, 1912, Horst Company sent a night letter to Pabst Company saying (p. 52) that Mr. George (Horst's representative in Chicago) had wired them that Pabst Company was negotiating resale to other dealers of the two thousand bales Cosumnes sold to them by plaintiff, and added:

"We are willing hold these hops on coast if you accept deliveries now on coast less freight allowance. We are willing resell the two thousand bales for your account or we are willing to exchange all or part \* \* \* We must know your conclusions now so we can complete our nineteen twelve deliveries to other buyers please wire us fully direct to San Francisco" (p. 52).

To this the Pabst Company wired Horst Company under date of September 26, 1912:

"Will not accept deliveries now or make any trade before full line of samples submitted to us may consider cancellation of contract with offer from you" (p. 133). Upon receipt of this last wire the Horst Company wrote Pabst Company saying:

"We sent you today by first class delivery mail twenty samples of hops, including a number of samples of 1912 Cosumnes hops of the contracted quality" (p. 133). Adding "We will thank you to wire us upon receipt of the above samples numbered 1 to 20 all the numbers that you prefer and please give us the numbers in order of your preference and we will fill your order as much as possible in the order of your preference" (p. 134).

The Court will note that this last quoted wire establishes that Horst Company accepted Pabst Company's interpretation of the contract set forth in their purchase order, viz: that samples were necessary to be submitted in order to comply with that interpretation of the contract.

Particular attention is also called to the fact that Horst Company makes no mention of "air dried" hops in any of the 1912 letters.

Under date of October 4th, Pabst Company notified Horst Company concerning these samples that

"after close inspection it will be impossible for us to accept hops of this nature on our contract, as same are not choice" (p. 63).

Under date of October 9, 1912, Horst Company wired Pabst Company asking them to wire wherein they claimed samples submitted were below quality (p. 64).

To this Pabst Company replied on October 9, 1912, saying:

"Color shows no life, picking poor flavor and substance of samples submitted by you in no way compare with other choice cosumnes submitted by others" (p. 64).

To this on same date Horst Company by night lettergram replied:

"Referring your today's wire please send us line of samples of such cosumnes hops as you will accept" (p. 64).

Under date of October 10, 1912, Pabst Company replied:

"In reply to your telegram of to-day we beg to state that we have forwarded you four samples of choice cosumnes hops. Kindly compare these with your samples" (p. 65).

It will be noted that all mention of "air dried" as description of hops had been abandoned by both parties.

Under date of October 14, 1912, Horst Company wired:

"Have received from you two of four samples advised in your letter October tenth please wire us that you will accept deliveries equal to those four samples and we will try arrange deliveries accordingly and if you will please wire us from whom you received the four samples you sent us we will try to purchase the identical lots for deliveries to you" (p. 65).

To this Pabst Company replied under date of October 15, 1912:

"Must see samples cosumnes deliveries you can make equal four samples mailed you as we expect to dispose of same on coast" (p. 66).

To this Horst Company replied to Pabst Company under date of October 15, 1912:

"If you wire you will accept hops equal samples you sent we will arrange accumulate such hops for you but we cannot submit further samples without we buy hops and we cannot buy and increase our stock unless you wire you will accept hops equal your samples" (p. 66).

Thereby Horst Company offered a complete settlement of differences and to substitute a new agreement for the pending inchoate contract.

To this Pabst Company replied by night lettergram under date of October 21, 1912:

"Will accept hops on contract equal four samples you received from us but insist upon you forwarding samples of deliveries before shipments go forward" (pp. 322, 323).

Thereby Pabst Company accepted Horst Company's last mentioned offer and if any contract was made by the parties this lettergram showed it as a contract of sale by samples equal to type samples sent, viz., 21 to 24. These were in no way connected with Horst process "air dried" hops.

Under date of October 23, 1912, Pabst Company wrote to Horst Company notifying them that if they had delivered choice Cosumnes hops equal to four samples mailed them defendant would have accepted same as follows (pp. 323, 325):

"Pabst Brewing Company.
Milwaukee, Wis., October 23d, 1912.
E. Clemens Horst Company,

San Francisco, Cal.

Gentlemen:—

Your favor of the 18th inst., at hand and contents noted. We beg to state that we never

committed ourselves not to take the 2000 bales of Choice Cosumnes hops on contract, equal to the four samples we submitted to you, as you will note in our telegram to you of October 21st, to which we have no reply at the present time, in which we asked you to forward samples of deliveries you can make equal to the four samples mailed you, and furthermore, we beg to state that there was no specified time mentioned when hops were shipped, and the entailed loss you have had up to the present time by holding these hops has nothing to do with this deal whatever. If you could have delivered choice Cosumnes equal to the four samples mailed you we would have accepted same, but insisted on you forwarding samples, which you have not done up to the present time. We certainly would not accept any Cosumnes equal to any of your 20 samples submitted to us, as the quality is too poor. Furthermore, we beg to state that our replying to dispose of same on the Coast would not prevent you from forwarding samples as we must insist upon seeing what we buy.

We are also desirous of letting you know that we use Cosumnes and Sacramento hops in our brewery, but of a much better quality than any of your samples submitted. What we have published is that we would not use any more Cosumnes like your 1911 shipment, which you must admit were the poorest picked hops on the Coast. We are also not at liberty to let you know from whom we received the four samples Choice Cosumnes, but we must insist upon you forwarding samples of choice Cosumnes equal to the four samples, whether you

have same in stock or not.

Hoping to hear from you, we remain,

Yours truly,

PABST BREWING COMPANY,

By C.Z."
By C.Z."

Under date of October 29, 1912, Horst Company wrote Pabst Company and acknowledged receipt of said last quoted letter of October 23, 1912, as follows (p. 325):

"San Francisco, Oct. 29th, 1912.

In reply refer to H-57158.

Pabst Brewing Co., Milwaukee, Wis.

Gentlemen:

of October 21st.

1912 Crop Sales.

Received your favor 23rd inst.

By special Delivery mail we send you today a line of samples No. 25 to No. 38 inclusive, equal to which we are ready to make deliveries to you.

We have just satisfactorily completed a 1500 bale delivery of 1912 Choice Hops to one of our Middle West clients. These 1500 bales were on the same line of samples as above sent you.

Faithfully, E. CLEMENS HORST Co.,

E. C. Horst."

ECH/J.

Thereby Horst Company acted under and confirmed the contract closed by Pabst Company's wire

These fourteen samples 25 to 38 mentioned in this letter of October 29th, were received by Pabst Company on November 2nd, and on November 4, 1912, Pabst Company forwarded night letter to Horst Company reading:

"Cannot accept samples, as they are not according to choice quality specified in contract. We herewith cancel contract for two thousand bales entered with you because of your inability to comply with specifications" (pp. 57, 58).

Under date of November 5th, Horst Company wired that they disagreed with Pabst Company's comments on quality of samples sent and to their statements that Horst Company was unable to comply with contract, and asked Pabst Company to please wire in what respect they claimed samples 25 to 38 inclusive to be below contracted quality, as follows (pp. 58, 59):

"Postal Telegram Company.

NIGHT LETTERGRAM.

San Francisco, Nov. 5, 1912.

Pabst Brewing Co., Milwaukee, Wis.

Replying to your vesterday's wire received today we disagree with your comments on quality of samples sent you and to your statement that we are unable to comply with our contracts with you, please wire us in what respects you claim samples twenty five to thirty eight inclusive to be below contracted quality and whether you claim none of all samples sent you is equal contracted quality. Please also wire whether you will pay us decline in market if we consent cancellation two thousand bales sales we cannot release contracts without proper settlement we suggest that our letter October eighteenth offers fairest method of adjusting matter. We are willing submit further samples and are willing that Chief Inspector of San Francisco Chamber of Commerce or other high class competent disinterested parties to be agreed upon shall pass upon quality. E. CLEMENS HORST CO.

Charge E.C.H. 137 words."

It will be observed that therein all claim as to "air dried" requirements are abandoned by Horst Company, and that Horst Company base their claim

for damages on the quality of samples 25 to 38 being equal to the type samples 21 to 24.

Under date of November 7, 1912, Pabst Company wired to Horst Company:

"Samples we sent you represent choice quality cosumnes which our contract specifies and to which none of your samples compare. Our judgment and experience sufficient to warrant our action in cancelling contract because of insufficient quality samples submitted by you. Have partially covered quality at higher than our contract price with you because of our rejection therefore will not entertain suggestion to pay you difference" (p. 59).

The testimony is that samples 21 to 24 submitted by Pabst Company to Horst Company were not "air dried" hops of the peculiar process carried on by Horst Company (p. 275).

The same is true of some of the samples 25 to 38 submitted by Horst to Pabst.

Horst, himself, testified (p. 81):

"They are not all cosumnes air dried hops. Among them are other hops."

# THE COURT ERRED BY REJECTING ALL TESTIMONY NOT LIMITED TO "AIR DRIED".

Horst Company's position announced early in the trial of the case, was that no testimony should be considered except such as pertained to "air dried" Cosumnes hops of the peculiar Horst process and amended its complaint at the commencement of the trial (p. 40) by inserting the words "choice

air dried" before the word hops in all pertinent allegations.

The trial Judge adopted this theory as his own and without any objection being interposed by Horst Company's counsel the trial Judge interrupted Pabst Company's counsel while he was examining his first expert witness as to the price of Cosumnes hops, by ruling as follows (p. 89):

"Mr. Powers. Q. The agents in turn sell to brewers after they buy do they not?

The Court. You are asking about the price of an article we are not concerned with here at all. You are asking the price of Choice Cosumnes Hops. Now this contract calls for a specific article and you must confine your examination to that. We are dealing here with choice Cosumnes air-dried hops.

Mr. Powers. The intent of the parties as shown all the way through, was that at one time it was air-dried, and the next time they did

not say air-dried.

The Court. Both telegrams, if you will read them say air-dried.

Mr. DEVLIN. They set out the contract in

the answer.

The COURT. The whole controversy here is over choice air-dried Cosumnes hops. It is my duty to confine the inquiry to the matter that is in controversy here. The jury is not to be distracted by evidence that is not going to effect their judgment.

Mr. Powers. Q. With reference to Cosumnes hops, how are hops in the Cosumnes

district dried?

A. By hot air. I have been there on the ground many times."

And with one conspicuous exception the trial Judge adhered to that rule.

During the testimony of the witness Sweeney, the trial Judge required the counsel to confine himself to "air dried" hops, as follows (p. 257):

"Q. Were you familiar with the value of Cosumnes hops in the year 1912, in the month of November? A. I was.

Mr. Devlin. I shall object unless the in-

quiry be confined to air-dried hops.

The Court. He does not think that has any significance. I am bound to instruct the jury that it has. It characterizes the class of hops that are called for by this contract. Confine yourself to air-dried hops.

Mr. Powers. Exception."

Pabst Company took the position that the correspondence carried on in 1911 did not constitute a contract because the minds of the parties had not met; and that the only binding contract between the parties was contained in the series of telegrams and communications carried on in 1912.

The effect of said telegrams was as stated in the instruction offered by Pabst Company and refused by the Court over exception taken before the jury which read as follows (pp. 381-3):

"It is admitted that on October 15th, 1912, the plaintiff sent to the defendant a night letter-gram signed E. Clemens Horst Co., of that date, which has been introduced in evidence; that the defendant replied to it by the telegram, signed Pabst Brewing Co., dated Oct. 21st, 1912, which has been introduced in evidence; that the plaintiff replied to the last mentioned telegram by the letter of Oct. 24th, 1912, signed E. Clemens Horst Co., which has been introduced in evidence. That on Oct. 18th, 1912, the plaintiff wrote to the defendant a letter

signed E. Clemens Horst Co., which has been introduced in evidence; that the defendant replied to the last mentioned letter by letter dated Oct. 23, 1912, signed Pabst Brewing Co., which has been received in evidence and that the defendant replied to the last mentioned letter by letter dated Oct. 29th, 1912, signed E. Clemens Horst Co., C. E. Horst, which has been received in evidence;

I instruct you that any contract which was entered into between the plaintiff and defendant before the exchange of these telegrams between October 15th, 1912, and October 29th, 1912, was modified by the last mentioned correspondence. So that even if there was prior to October 15th, 1912, any contract between the plaintiff and the defendant by which plaintiff was to sell and the defendant was to purchase two thousand bales of hops at the price of twenty cents a pound, plus freight at Milwaukee, or F. O. B. Pacific Coast, vet from and after this correspondence of October, 1912, it became the duty of the plaintiff if it would fulfill its contract to sell and deliver to the defendant two thousand bales of hops equal to the four samples of hops which the defendant had theretofore sent to the plaintiff and it also became the duty of the plaintiff, if it would fulfill its contract to furnish to the plaintiff before shipping or delivering to the defendant any of the said two thousand bales of hops to furnish to the defendant samples of the hops which it proposed to ship, which samples were required to be equal to the said four samples sent by the defendant to the plaintiff and it was the plaintiff's duty to furnish these samples within a reasonable time after October 21st, 1912, and if you find that the plaintiff did furnish to the defendant samples of the hops number 25 to 38 mentioned in the said letter of October 29th, 1912, but that the last mentioned samples were not equal in quality

to the four samples sent by the defendant to the plaintiff as aforesaid, or if you find that the plaintiff did not within a reasonable time after October 21st, 1912, furnish to the defendant samples of hops equal in quality to the said four samples sent by the defendant to plaintiff then and in either of these events your verdict should be for the defendant."

That Horst Company accepted the offer of a sample contract as a binding contract in lieu of pending negotiations is shown by its acts in forwarding samples 25 to 38 to comply therewith and by their letter of October 29, 1912, referring to the forwarding samples as their offering of hops equal to the type samples after they had received Pabst Company's letter of October 23, 1912, in which Pabst Company confirms their telegram of October 21, 1912, agreeing to accept hops equal to the four type samples.

The practical construction placed on a contract by the parties themselves takes precedence over the literal construction of its terms.

Mitau v. Roddan, 149 Cal. 14; Mayberry v. Alhambra, 125 Cal. 444-446.

The contemporaneous action of the parties shows that Pabst Company on October 10th, 1912, forwarded four samples as a basis for negotiations for a new substituted contract to replace all pending negotiations.

Horst Company accepted this suggested substitute on October 29, 1912, and wrote:

"By special delivery mail we send you today a line of samples No. 25 to 38 inclusive, equal to which we are ready to make deliveries to you' (p. 325).

This made a binding contract on the basis of delivery, equal to the four type samples 21 to 24, as set forth in the rejected instructions just quoted.

"Tell me," said Lord Chancellor Snyder, "what you have done under a deed, and I will tell you what that deed means."

Keith v. Electrical Eng. Co., 136 Cal. 178-181;

- 1 Beach on Modern Laws of Contracts, Sec. 721;
- 2 Wharton on Contracts, Sec. 653.

Moreover Mr. Horst testified (p. 110):

"Q. Did you furnish them samples in 1911

before shipment?

A. I presume I did. I do not know whether I did or not. It was not customary to send samples before shipment of the goods. \* \* \* \* After I sent the wire to the Pabst people reading, 'If you wire you will accept the hops quality samples you send, we will arrange accumulate such hops for you', I received the four samples marked 21 to 24. Two came in one mail and two came the next day. I subsequently shipped them samples of hops thus marked 25 to 38, that I considered to be in conformity with these four samples of hops."

It will be observed that notwithstanding he testified it was not customary to send samples, that he did send samples.

Hence he must have sent these samples 25 to 38 to comply with the agreement concluded when the

Pabst people wired they would accept hops equal to the samples in compliance with Horst Company's request.

At that time he evidently understood the contract to mean a purchase of 2000 bales of hops "equal" to samples 21 to 24 (which were not "air dried") and hence the deliveries need not have been "air dried" and samples 25 to 38 were not all "air dried".

Counsel for Pabst Company saved many exceptions to rulings refusing to allow testimony as to price and value of Cosumnes hops in November, 1912, because not "air dried" which will be hereinafter set forth in accordance with the rules of this Court.

As a sample we will cite questions asked Mr. Horst (pp. 221-222-223-224):

"Q. Did you not in the latter part of November, 1912, buy some Cosumnes hops from Wolf Netter & Co.?

Mr. Devlin. I object to that as irrelevant, incompetent and immaterial unless it is confined to air dried Cosumnes hops.

The Court. Yes, I think so.

Mr. Powers. I will take ruling on that, after I call your attention to the facts. The final telegram between the parties do not refer to air-dried Cosumnes hops.

The COURT. I have watched those carefully. I shall instruct the jury that there was no change in the contract in that respect. The

objection is overruled.

Mr. Powers. Exception.

Exception No. 62.

Mr. Powers. I would like to call your Hon-

or's attention to another fact.

The COURT. I have ruled. I have got the whole thing in my head. If I am mistaken you are benefited by it.

Mr. Powers. I will note my exception.

The Court. I want the case to go along. I do not want to go over these things time and time again. I keep these things in my mind as I go along. I will rule on your objections.

Q. Did you buy Cosumnes hops of the same quality as air-dried Cosumnes hops in the latter

part of November, 1912?

The COURT. That is the same question, exactly. You may ask if he bought air-dried Cosumnes hops.

Mr. Powers. The objection is supposed to

be made sustained and I except.

The COURT. It is the same objection. I do not require it to be repeated.

Mr. Powers. Exception.

#### Exception No. 63.

Q. Did you buy hops in San Francisco of a character which was accepted by the trade as Cosumnes hops which could have been used as a delivery on the 4 samples numbered 21 to 24, submitted by the Pabst Brewing Company

to you?

Mr. Devlin. I object on the grounds heretofore stated, and on the further ground that it is hypothetical argumentative, and asking the witness to go through a mental process for the purpose of determining whether they would be accepted or not accepted, vague, indefinite and uncertain.

The Court. The objection will be sustained. You will confine yourself to air-dried Cosumnes hops.

Mr. Powers. Exception.

The Court. This plaintiff was not bound to make any purchase of hops that he might imag-

ine would be accepted under his contract, when they were not the hops that were called for by the contract.

Mr. Powers. It is for the purpose of, showing that while he sold our hops for 14 and 15 cents, that he bought other hops for 17 cents of the same character, and therefore he did not use proper care in the sale of our hops.

The COURT. If you have reference to the same character of hops stipulated for in the contract, I will admit it; otherwise I will not.

Mr. Powers. It is preliminary, first, that he bought Cosumnes hops, and then I want to show that they were of the same character commercially as air dried.

The Court. I understand you exactly. I will permit you to show that he bought air-

dried Cosumnes hops.

Mr. Powers. There is no necessity of indulging in any sort of controversy at all about that. I have stated my purpose. May I now renew my objection with the purpose stated, and save my exception. That goes to all the questions.

The Court. Yes.
Mr. Powers. Exception."

In addition to the foregoing, the question concerning the propriety of confining testimony to "air dried" hops was raised as follows:

- a. Exception to the ruling of the Court instructing counsel not to offer any evidence except as to "air dried" hops.
- b. The objection to the notification by the Court to the jury that he would instruct them that they could only take into consideration evidence referring to "air dried" hops.

- c. Exceptions reserved to overruling question as to whether or not samples 25 to 38 were all "air dried" hops.
- d. Exception to the instructions to the jury that Pabst Company obligated itself to purchase "choice air dried Cosumnes hops".
- e. Exception to the instruction of the Court refusing to instruct the jury that any contract which had been entered into between plaintiff and defendant was modified by the correspondence between October 15, 1912, and October 29, 1912, so as to transform it into a contract for purchase of 2000 bales of hops equal to the four type samples of hops.

These will appear hereinafter in extenso in our specifications of errors herein.

# AS TO ERROR IN PERMITTING SELF-SERVING TABULATED DEDUCTIONS FROM THE BOOKS WITHOUT INTRODUCING THE BOOKS.

2. The Horst Company's method of carrying on their business, other than filling contracts in existence, was to sell goods through their Chicago and New York offices.

There was a manager in charge of each of these offices.

No books were kept at these offices.

No one who was connected with either of these offices testified.

No attempt was made to take the depositions of any one connected with either of these offices as a participant in its transactions.

No one testified concerning the books of the Horst Company who was familiar with any of the transactions which occurred in the Chicago and New York offices.

Those who did testify were Mr. Horst, the manager and principal owner of the Company, and a special assistant to Mr. Horst.

These witnesses were so highly interested that secondary evidence should have been received from them with great caution.

Moreover, Mr. Horst testified that he commenced to prepare for the trial of this case before the hops in question were picked (p. 135), and Mr. F. G. Ernest Lange, the other witness referred to, described himself as follows:

"I handled the general office work and special work for Mr. Horst and have been so connected for the last ten years" (p. 142).

He showed so great interest in Horst Company's cause as to require great caution in accepting other than primary evidence from him.

No bookkeeper in the San Francisco office testified.

Mr. Lange testified that men in Chicago and New York made out written reports as to their transactions each day and sent them on to San Francisco weekly, but he did not claim to know these facts of his own knowledge.

No entry was made in the San Francisco books or any other books of the Horst Company concerning any sale to Pabst Company.

A short time before the trial of the case, and more than a year after the receipt in San Francisco of the so-called written reports from Chicago and New York, Mr. Lange, the said special assistant, computed what he considered to be a proper proportion of the charges for the overhead expenses of the Chicago and New York offices, and applied them to certain so-called 2000 bales of Pabst hops. No one testified to ever having seen any 2000 bales of Pabst hops. No 2000 bales of hops were ever segregated or entered on the books of the company for Pabst Company.

No consideration was given to the sale of the remaining portion of 10,500 bales which Horst Company's San Francisco office had on hand on November 4, 1912 (p. 235), and which the Chicago and New York offices would have sold if they could. Whether they did or not was not possible to be ascertained by Pabst Company because of the manner of introducing the testimony without the books and without any witness who actually knew anything of the actual conduct of the Chicago and New York offices being sworn.

# THE COURT ERRED IN REFUSING TO REQUIRE THE BOOKS TO BE INTRODUCED.

3. At the trial of this action the Court of its own motion refused to require the Horst Company to bring its books into Court.

The books were never introduced in evidence.

Pabst Company's attorneys from time to time attempted to get information from the books and were promised the information, which information was never given, and the records will show the statements were made by the Horst Company's witnesses on the witness stand time after time that they could not give the evidence because the books were not present, and although they specially agreed to subsequently furnish the requested evidence, Pabst Company was compelled to let the case go to the jury without the evidence ever having been given.

Not only was the Horst Company permitted to introduce hearsay evidence, but the Pabst Company were absolutely refused the right of cross-examination, not only of the parties who were familiar with the transactions, but because of the absence of the books of the parties who extracted from the books so much thereof as they desired to use in self-serving declarations, except in such a way as to be ineffective.

It must be remembered also that these self-serving tabulations were made under the directions of the owner and manager of Horst Company, who prepared for the trial of this case before the hops were picked (p. 135), and by a man specially employed by him as assistant and who was not a regular bookkeeper.

Witnesses Lange and Horst were the only persons testifying as to the sales price and costs and expenses for sales. Their testimony was based upon written reports made by unknown persons who were never sworn or cross-examined.

The jury never saw the books.

Pabst Company's representatives only saw such books as Horst Company were willing to show them.

The witness Lange drew deductions from the written reports that the prices made were "coast prices," or prices where the purchaser agreed to pay for cost of delivery. He made tabulations as to expenses of collecting accounts from purchasers who had not paid for their goods in various cities throughout the East, and charged Pabst Company's account with certain accounts which he claimed to be uncollectable.

Mr. Horst selected such sales as he elected in 1914 to claim belonged to the Pabst Company's 2000 bales of hops. Bookkeeping Assistant Lange figured storage and interest on these particular goods.

Now these entries were taken from books where witnesses Horst and Lange testified that many of the entries were not accurate; and were not intended to be accurate; that the dates of shipments were approximate dates; that the entries that the goods had been shipped were not correct, but that

said goods were on hand and remained on hand for several months after the dates of the entries. The entire circumstances surrounding these books were that of suspicion of their use for the purpose of helping Horst maintain a case that he began to prepare before the hops were picked.

The two witnesses who knew about the facts which were introduced in evidence, to-wit, the managers of the Chicago and New York offices, were not sworn.

No explanation was made why they were not produced.

Zipfel who had charge of the entries of the movements of hops in the stock-book was sworn and examined as an expert but not as to his entries in the stock-book.

The bookkeeper who had charge of the San Francisco books was not sworn, and no explanation was made why he was not produced.

No excuse whatsoever was given why the primary evidence of the parties who knew of the transactions was not offered.

The secondary evidence itself, to-wit, the books themselves were not offered in evidence.

The Court specifically instructing the Horst Company that they need not produce their books over the demand of the Pabst Company that the books be produced and objecting to any evidence other than the books.

Their safeguard by way of cross-examination of witnesses who were familiar with the transactions was taken away from the Pabst Company and they were even curtailed in their cross-examination of the specially selected bookkeeping assistant as to compilations made by him because of the fact that it used up too much of the Court's time (pp. 197-239), notwithstanding the fact that this bookkeeping assistant said it took him five or six days to make up his tabulations and selections from the San Francisco books of such entries as he saw fit to consider were connected with the so-called Pabst hops.

The record shows that witnesses Horst and Lange were recalled several times during the trial so that the witnesses might furnish data and that the data would not be furnished because the witnesses would claim that the information could only be obtained by a long series of investigations which generally the Court would not permit because of lack of time.

The burden of proof of Horst Company's case was thus transferred to a requirement that Pabst Company prove the negative without knowledge even of the name of the persons who carried on the primary transactions in question.

At pages 75 and 76 the following rulings were made to questions asked witness Horst, who had testified that it took a long time to sell the goods and in selling they incurred traveling expenses, insurance and brokerage.

<sup>&</sup>quot;Q. What was the amount taken from your books?

Mr. Powers. The books are the best evidence.

Mr. DEVLIN. If you want the books we will bring them here. The books could be brought into Court, but it would take a great deal of time.

Mr. Powers. I would prefer to examine

the books in the ordinary way.

The Court. They do not need to be brought here. Counsel may have an opportunity of

examining these different items.

WITNESS. I am personally familiar with the several items outside of the books. I have made extracts from the books in a tabulated form.

Please produce it.

Mr. Powers. We object on the ground that it is irrelevant, incompetent and immaterial, a self-serving declaration, made by the party himself, and the books themselves are the best evidence.

The Court. The books are the best evidence, but he has a right to testify to the result derived from an examination of these books. You may verify them on cross-examination after having had an opportunity to examine the books.

Mr. Powers. Exception.

Exception No. 10."

HORST COMPANY'S BOOKS NOT KEPT IN A SUFFICIENTLY ACCURATE MANNER TO WARRANT THEIR ACCEPTANCE AS EVIDENCE.

Moreover, the testimony of Lange and Horst shows that the San Francisco books of Horst Company were not intended to be accurate records of the transactions in many instances and that the entries of the so-called weekly vouchers were not made regularly and the bookkeeper keeping the books did not testify.

The witnesses testified that none of the reports were made as a charge against Pabst Company that was entered in the books.

Hence the reports were hearsay to the witnesses.

The reports were made by the managers of the Chicago and New York offices—both of these men could have been produced as witnesses.

Had they been produced Pabst Company could have cross-examined them as to the connection of each item of expense with Pabst goods, with the other Horst goods, with Horst Company's future business and with the plan to hold business in the future and the like.

No effort was made to take their depositions.

Lange testified that the Pabst Company were considered to have 2000 bales by selections made by him a short time before the trial of the case and Mr. Horst testified to the sale of said so-called Pabst 2000 bales by giving the sale price of 1506 bales "air dried" hops sold by Horst Company after November 4, 1912, and by treating sales of 494 bales delivered at various times before and after November 4, 1912, on certain contracts in existence with other customers on November 4, 1912. There were 1062 bales of "air dried" hops sold during the same period to other customers having similar contracts and there

were 2536 bales of other hops sold by Horst Company after November 4, 1912, making a total of 3882 bales (p. 192). These 3062 bales were included in the total of 10,500 bales of hops which were in the hands of Horst Company for sale on November 4, 1912 (p. 235). The expenses of the Chicago and New York offices from November 4, 1912, to July 1, 1913, were used by Lange (p. 197) as being overhead for the sale of these 3882 bales, and the same was divided in the proportion of  $\frac{1346}{3882}$  to Pabst Company and  $\frac{2536}{3882}$  to Horst Company, or proportionately \$4459.30 for Pabst Company's 1346 bales.

In this computation no account whatsoever is taken of efforts on the part of the New York and Chicago offices to help sell so much of the 10,500 bales on hand in San Francisco, but not included in 3882 bales assumed to be sold by them.

Lange testified that 494 bales of hops had been used by Horst Company to fill contracts in existence with other customers on November 4, 1912.

The bookkeeping assistant Lange, testified to many entries in the books which he knew to be wrong.

The very fundamental fact about which Lange testified, to wit, the total number of bales of hops which were the subject of the so-called overhead from November 4, 1912, to July 1, 1913, was never at any time established at a definite figure.

In fact, it was given at two different figures—sometimes at 1346 bales and sometimes at 1503

bales. The books subsequently introduced show both figures are wrong and that the true amount was an entirely different figure, to wit, 1336 bales.

These figures are shown at the following pages.

In the early days of Mr. Lange's testimony he referred to the overhead being charged to Pabst Company on the basis of 1346 (p. 154), i.e., to a question asked him by Mr. Devlin:

"And the percentage that would apply to the 2000 bales you arrive at simply by figuring?" He answered: "The percentage that would apply to the 1346 bales."

The Court said, on the same page:

"The only means, then, by which you arrive at these figures, is by taking a certain percentage of the overhead charge in proportion of the number of pounds of hops sold, the 1346 bales, and you take the proportion of the 1346 bales to the entire amount of business transactions, or the volume of business during the period in which you were engaged in selling these 1346 bales."

At page 192 Lange testified, when asked the question:

"What was the gross amount of the business done in Chicago and New York offices from November 4, 1912, to July 1, 1913?" by answering 3882 bales."

On page 183 he testified to question asked him:

"What other goods were being sold by the New York office at that time besides these 3062 Cosumnes hops?" by answering: "A total of 2536 bales." But when Mr. Horst subsequently discovered that 1346 bales, added to the 494 bales that were allotted to prior contracts as Pabst goods, or even the 497 bales which were testified to at other times (and the inaccuracy as to these two amounts is equally glaring), Mr. Horst testified in the later days of the trial (p. 243) to question asked by Mr. Devlin as follows:

"After November 4, 1912, how many of these bales of hops that you call choice air-dried Cosumnes hops, did you sell? Answer: "1503 bales. In my statement I gave Pabst credit for some 500 bales that were sold on prior contracts."

This testimony was given after Mr. Lange had been cross-examined for several days.

Certainly, witnesses who examine books and report deductions therefrom, showing as simple an item as the number of air-dried Cosumnes hops sold between November 4, 1912, and July 1, 1913, who make the positive statements that the books show 1346 bales at one time, and 1503 bales at another, should have their testimony as to the other deductions from those books viewed with great distrust.

Now, both these figures were wrong.

By continuous persistence on the part of the attorneys for Pabst Company, despite the numerous failures to keep promises as to facts from books by the Horst witnesses, said attorneys were able to force the introduction of the sales book

in evidence, and on the very last day of the trial they had their expert assistant testify as to his addition from the entries in this sales book; he testified that he had checked up the sales of Cosumnes hops for 1912 and "added up the number of bales that were shown in this book as having been sold on dates prior to November, 1912; they amounted to 2764 bales" (p. 365).

It will be observed also that no person on behalf of Pabst Company contradicted this computation from the actual books.

Now the testimony is, that the total number of air-dried Cosumnes hops manufactured that year, with the exception of pick-ups, was somewhere between 4000 and 4300 bales.

(This discrepancy as to the total number of bales will be pointed out hereafter as a further evidence of the inaccurate manner of keeping these so-called books.)

For the purpose of this discussion we will take the figures of the witness Conrad who had charge of the picking and who testified (p. 136):

"I have charge of the picking of the 1911 and 1912 crop. \* \* \* We baled 4300 bales that year, of which 200 bales were clean-ups. It made them 4100 bales better because we took out the clean-ups. The hops were airdried."

If we deduct from this 4100 bales, the number of bales sold prior to November 4, 1912, we will have the number of bales of hops which should have been on hand, if the books are correct, to wit, 1336 bales.

Consequently we have from the testimony the following figures as to the number of bales on hand on November 4, 1912; Mr. Lange (p. 154), 1346. Mr. Horst (p. 243), 1503, and the books when introduced show 1336.

Mr. Horst testified (p. 242) that the total number of bales air-dried on hand on November 4, 1912, was 3062 bales, and at page 114 he testified: "I had 2900 bales at the time the Pabst people defaulted", another discrepancy of 162 bales.

At page 243 he testified:

"The other 1062 bales were delivered on contracts on which we had already made a profit because of decline in the market on November 4th."

The absolute impossibility of a Court accepting deductions from such witnesses, from such books, without any testimony of any person who was connected with any of the transactions, itself shows the extreme danger of departing from the rules of evidence, and the extremely prejudicial character of the error in allowing deductions from books not in evidence.

Again to show another discrepancy, take the matter of the total number of bales of air-dried Cosumnes hops produced in 1912.

Mr. Horst testified (p. 55):

"We raised something over 4500 bales that year. \* \* \* There was about 150 bales

of clean-ups and about 4350 bales of choice hops."

As has already been shown, Mr. Conrad, the man in charge of the picking, testified that they baled 4300 bales that year, of which 200 bales were cleanups, and that had made the 4100 bales better because of the clean-ups.

Again to show another discrepancy:

Mr. Lange testified (p. 155), on direct examination, "There were 497 bales sold on prior contract" and Mr. Devlin used the same figure in asking a question, on page 156.

A few days later, Lange changed his testimony, while being cross-examined by Mr. Powers (at page 182) by making 494 bales apply to contracts already in existence, and when Mr. Powers attempted to pin him down to the exact statement of facts as to when the 1062 bales were delivered on contracts not allotted to Pabst, he took refuge behind the usual statement that he would get a tabulation of it.

But that tabulation was never produced.

And never at any time did Mr. Horst or Mr. Lange give the dates when the 494 bales or 497 bales were actually delivered.

# THE BOOKS WERE NOT INTENDED BY HORST COMPANY TO BE ACCURATE RECORDS OF THE TRANSACTIONS.

Lange testified that of these 494 bales segregated for Pabst Company, 20 of them had been already sold to a man named Hohenadel (p. 266).

The sales book itself shows that the Hohenadel sale was made August 23, 1913 (p. 267). The shipments were in February and March, with October 11th stricken out. That was lot 518; and at (p. 227) Mr. Horst testified that the Hohenadel sales, October 12th, 30 bales from 518 and the sales book entries show no sale to Hohenadel on October 12th (p. 264). The Court asked the question:

"The Court. Here is 30 bales that were shipped to the order of E. Clemens Horst Company, New York, notify John Hohenadel. Now, counsel, and not without reason, asked you why those 30 bales were noted here 'Notify John Hohenadel,' and he asks you if that would indicate that the sale had been arranged prior to November 4th.

A. That is a part of the 494 bales that we sold previous to November 4th. It was not a part of the 1503 bales."

And at page 263 he testified:

"That entry does not mean that we sold them to Hohenadel. It means that we were shipping to ourselves. Notify him.

Q. It was shipped to him October 5th? A. Yes, exactly. It was not shipped to him. It was shipped to ourselves."

He specifically testified that no entries were made as against Pabst Company in the books from which he gathered the data for instance at page 265, he testified:

"We knew the lot numbers of those, and we knew the lot numbers of the 3062 bales on hand November 4th, so it was a very simple matter, having that information, to take out the 2000 bales, delivered after November 4th, on account of Pabst."

Mr. Lange also testified to many things showing that the books were inaccurate and not intended to be kept up with current business.

The question was asked (p. 194):

"Will you give me the amount of the general expense for the office for the month of July, 1913, and then we can see how they differed from the month of June.

A. I would have to go to San Francisco, and it will take possibly a couple of days to

get it" (p. 196).
"Q. You cannot, then, give us from your original records where the 2000 bales, or the 1346 bales that were set aside, that were sold for the Pabst Brewing Company account were stored on November 4, 1912.

"A. I do not have it here. That is in several books and it would take some time to point that

out to you, but I can do so.

Q. Will you give me the figures from which

you get that overhead charge?

The Court. You cannot spend that indefinite time on items like that. I think you have exhausted the subject.

- Q. I have not asked about this 2536 bales that forms the other factor. I want to know how to check up the accuracy of that amount. Where did you get that 2536 bales?
  - The sales book. Α.
- Is that salesbook available to be examined?
- A. No, sir, it is not here. This is the book I was speaking about this morning."

#### Also page 225:

"Also all hops originally were on the ranch and then my books show the date that the hops were ordered out.

A. I cannot give you the dates when they were stored. When they were harvested, they were on the ranch, and the harvesting ran from the beginning of August until the beginning of September as soon as they were baled.

Witness. The dates here are going to be kind of mixed up in the respective lot numbers."

#### Mr. Horst testified (p. 228):

"I will have to go over this list and see because these figures do not total up 4500 bales. A lot of the stock does not ever reach this stockbook. The entries were made in this book on pages 211 and 212, about the time that these stock movements were made, by Mr. Zipel.

\* \* Some of the lots of Cosumnes do not ever go into the stock-books, if they go out directly they are not in the stock-book, and they do not go on this page of stock on hand. When hops are baled out and shipped without ever being held on the ranch, that is stock moved out right away."

It will also be noted that Mr. Zipel was a witness but did not testify as to the books.

#### Again (p. 229):

"Q. Show me an entry as to where the other goods went out, other than the other goods you

have given us here.

Witness. I can give you this information as well as anybody else. Joseph Schlitz Brewing Company, 100, lot 542, on August 30th. That does not necessarily mean the day that it was shipped. It simply means the day we expected to ship them."

## Again (p. 234):

"We have certain goods on hand that we ship out at approximate dates. November 4th,

on these are approximate dates. The total amount of goods is shown by the book. The hops would be in our hands long after these dates, that I have given you.

The COURT. What do you mean by approxi-

mate dates?

A. These are the dates when the entries are made. When we hear of a shipment being moved, a lot of hops being moved, from one ranch to the buyer, or any hops being shipped to a buyer, then we enter it up of that date, as of that date. Many of these lots there will be entered up as of a certain date, and they will be on hand after date."

It must be very evident that these books were not intended to be accurate records of current transactions as they occurred.

It will be noted that after the recalling many times of Mr. Horst and Mr. Lange and the Court refusing to allow further cross-examination, Mr. Horst agreed (p. 237) as follows:

"Q. If you will give me a list of the hops that were made to fill the contracts that you then had in existence, I will be obliged to you.

A. I will pick that out for you.

- Q. What reshipments were made by you of Cosumnes air-dried hops after they left the coast?
- A. I will pick that out for you from the book.
- Q. Will you give me a list of such of the contracts as were filled by Cosumnes hops prior to November 4th, 1912?
  - A. Yes.
  - Q. I want the dates and the amounts.

A. All right."

But Pabst Company was compelled to close its case without this list.

## Mr. Horst also testified (p. 241):

"The list of sales that went through the New York office were *compiled* from our San Francisco books.

Q. What record shows that the Cantiler Brewing Company bought 20 bales through the

New York office?

A. Those are sales not only in New York, but New York, Chicago, San Francisco and all other places. The New York office did not have sales sheets. We do not keep any New York books. This record is made from communications that come here from the New York office."

## Again at page 245:

"Q. You were to look up and see whether there was any reduction in price to these breweries because of rejection of Cosumnes hops in 1912, did you do so?

A. I have not been able to get at that yet."

#### Again:

"Q. What allotment had been to these various contracts when the Pabst contract was breached, according to your theory, November 4th, 1912? Kindly give us the amount that the 1062 bales finally sold for.

WITNESS. Yes, I will have to make up that statement for you. I will be pleased to make

it up for you."

#### But he never did.

When Horst Company desired to cross-examine concerning testimony of Lange taken from the books, they were left to the mercy of manager Horst, who

prepared this case from the time they commenced to pick the hops and his assistant Lange, because the Court overruled the objection to testimony from the books without requiring the books to be introduced in evidence. And without the books no proper cross-examination of Lange was possible.

Again bookkeeping assistant Lange testified:

"Q. And that period has not expired? (p.

186).

A. No, sir. I would not say that there was a contract as to the length of time, but there was an agreement as to his salary. I do not know whether there was a stated salary. The salary of \$500 continued about three of the months after November, 1912; January, February and March, 1913, the salary was \$500.00. In November and December he got \$350.00. I do not know why the salary was raised. The number of bales of Cosumnes hops on hand December, 1912, was 1246. I do not know where Pabst goods were at that time.

Q. Can you find out for us?

A. Yes.

The COURT. What is the materiality of this? Mr. Powers. There are certain freight charges that are made on these goods. Our understanding is that they were shipped from one place to another. I want to check them over.

Q. On January 1st, 1913, how many Pabst

goods were on hand unsold?

The Court. I regard this as very immaterial,

unless you show me that it is material.

Mr. Powers. They raised the salary of the New York man when the amount of goods was less to be sold, and it shows that there was no connection whatsoever between the amount of Pabst goods to be sold and the expenses.

The Court. That does not make any difference. A man transacts his business in a certain

way. There comes a time when he feels that an employee's services are worth an increase in salary. Now the particular condition of the business with reference to any one transaction is wholly immaterial. It is immaterial as relating to a particular transaction except in so far as it may properly be charged to the proportional amount of the entire expenses of that transaction. I cannot permit you to go into this in such minute detail."

## Again (p. 192):

"Q. What was the gross amount of the business done in the Chicago and New York offices from November 4th, 1912, to July 1st, 1913?

A. 3,882 bales of hops.

Q. How much of the expense incurred was incurred for the purpose of maintaining that establishment and having it ready to do business the following year?

A. I do not know.

Q. How much of it was incurred to finish up business that had been inaugurated prior to November 4th, 1912?

A. I could not say.

Q. How much of it was incurred because of contracts that were in existence on November 4th, 1912, and had to be carried out because of the existence of those contracts?

A. I do not know that there was any. The New York offices rented and it is necessary to maintain an office prior to November 4th,

1912, and thereafter.

Q. It is a costly matter to assemble an office force, is it not?

Mr. Devlin. This is objected to as hypotheti-

cal, vague, indefinite and uncertain.

Mr. Powers. To show that a portion of this expense was for the purpose of preventing the office force from being disseminated and thereafter got together, and that there has been no

allowance for that purpose, I am showing that the method of computation is wrong. I am trying to do that if I can. A portion of this expense should be charged generally to up-keep, and not to these two lots of hops that were on

hand at the time is my theory.

The witness has testified that there was a certain number of hops on hand. He has divided the hops into two lots. The Pabst lot and those which were not the Pabst lot. He has proportionated the expense of the selling of those two lots among two offices without taking into consideration the fact that a part of that expense was due to the general up-keep of the business. I am trying to show that it is not a fair way of proportioning that expense, because a certain portion of it was necessary for the holding of the office together, keeping it from being separated, and then having to pull it together again for next year's business.

The Court. I do not think that is tenable.

Mr. Powers. Exception."

Again (p. 194):

"Q. Will you give me the amount of the general expenses for the office for the month of July, 1913, and then we can see how they differed from the month of June.

The Court. I do not think it will be material if it were here, to tell you the truth, Mr. Powers.

Mr. Powers. I will take your Honor's ruling on it.

The COURT. If you are going to get it here, then I will rule on it. I do not believe it would be material.

A. I would have to go to San Francisco, and it would take possibly a couple of days to get it.

Q. Have you got the report of the warehouse holdings during the month of November, De-

cember, January, etc., to July, so far as they affect the Pabst goods.

A. I have not that.

Q. When can we have that?

A. I believe I can get it for you to-night."

### Again (p. 195):

"Q. We want to know which of these goods have been rejected, and whether or not the Pabst people were given goods that had been rejected, and the 1000 bales that were not given to Pabst were goods that had been rejected. I want to know the history of each of the bales you designate as Pabst goods. For that reason I will want to know where they were stored. I move that all of the evidence of the witness with reference to overhead charges be stricken out on the ground that it is dependent upon items that are not shown to be in any manner connected with the Pabst Brewing Company's goods, or the goods that Horst set aside for the Pabst Brewing Company, or designated to fill the order of the Pabst Brewing Company, and that it is based upon hearsay evidence of expenses by the other parties, and is immaterial and irrelevant, also a conclusion of the witness as to the particular amount to be charged, based upon matters that lie partly in law and partly in facts, and also calling for the opinion of the witness.

The Court. The motion is denied.

Mr. Powers. Exception.

Exception No. 57."

(p. 196) "Q. You cannot, then, give us from your original records where the 2000 bales, or the 1346 bales that were set aside—that were sold for the Pabst Brewing Company account, were stored on November 4th, 1912?

A. I do not have it here. That is in several books and it would take some time to point that out to you, but I can do so.

Mr. Powers. That is the principal thing I

have been asking for for three days.

The COURT. You want to be able to verify the

fact that they were all Cosumnes hops?

Mr. Powers. Yes. And our information is that some of these had been rejected, taken back and sold to different people. We want to be able to find out whether the 2000 bales that were set aside by Horst were rejected goods or not. We want to follow the goods from their origin to their place of departure. I want that so I can continue my cross-examination of Mr. Horst at as early a date as possible.

Q. Will you give me the figures from which

you get that overhead charge?

The Court. You cannot spend that indefinite time on items like that. I think you have ex-

hausted the subject.

- Q. I have not asked about this 2536 bales that forms the other factor. I want to know how to check up the accuracy of that amount. Where did you get that 2536 bales?
  - A. The sales book.
- Q. Is that sales book available to be examined?
- A. No, sir, it is not here. This is the book I was speaking about this morning.

Mr. Devlin. We will get it for you as long as you want it."

#### Again:

"On November 4th, 1912, we had three thousand odd bales Cosumnes hops on hand.

Q. State where they were.

A. I cannot state from memory. I can give you the data.

Mr. Powers. I move to strike out the testimony of the witnesses with reference to the existence of 2000 bales at that time because he was referring to records and the records were not produced.

The Court. The motion will be denied.

Mr. Powers. Exception.

Exception No. 61."

TESTIMONY OF F. G. ERNEST LANGE.

#### Again (p. 258):

"Q. You said you were familiar with the entries that appear in the books. Will you kindly show me where those 2000 bales of hops are charged in your books to the account of Pabst & Company?

A. They are not charged to Pabst & Com-

pany.

Q. Now, you say that there were a certain 2,000 bales of hops on November 4th, 1912, in certain warehouses. Will you show me the record of the whereabouts of those bales on November 4th, 1912?

A. I can show you some of the records. They are in several books. We did not bring them all here. I started out to do that with

Mr. Farrell."

# Again (pp. 259, 260):

"Q. You furnished the Court a statement from a list of entries, a list of the bales that were in various warehouses. Show me where you got that list of bales from?

A. It is impossible to show now. They are in several books, and it would take at least a

week to show them all to you.

Q. Show me one of them. Produce the exhibit that was filed here yesterday. You say there were 300 bales in Milwaukee. Will you kindly point out in the books where those 300 bales in Milwaukee were stored?"

### Again (pp. 260, 261, 262, 263):

"Q. Now, what date did those bales leave that warehouse?

A. I wish to amend the dates on that other one. I had the Milwaukee page. This is the warehouse company's actual page. Lot 464 was not in the warehouse. The only lots in the warehouse were, October 31st, 100 bales, lot 461; October 31st, 100 bales, lot 462; and October 31st, lot 465. They left the warehouse, 100 bales, lot 461, December 30th; 100 bales, lot 462, December 30th; 25 bales, lot 465, December 10th; 75 bales, lot 465, December 30th; I wish to say that these dates are only approximate dates. They are not the dates they left the warehouse. They are the dates shown in this book they left the warehouse, but those are not the correct dates. They are only approximate dates.

Q. Where can we find the correct dates? A. By looking through a great many files in

San Francisco.

The Court. Now, Mr. Powers, tell me what the materiality of the particular date is when

they left these warehouses?

Mr. Powers. They came in October, and if on November 4th, 2000 bales of them had gone out, there would not be 2000 bales on hand, and the method of computing the loss, if any, would be on a different basis.

Q. Show me where the 208 bales which were

in Chicago on November 4th, 1912.

A. I cannot show by this book where those hops were, that is on November 4th, without referring to a great many entries. We have

a great many entries in this book that are made prior to delivery, or prior to shipment, and some of them subsequent.

Q. How does it come that they were entered

in that way?

A. Mr. Horst explained it in his testimony the other day.

Q. I know he did, but I want you to ex-

plain.

A. We order out hops from San Francisco on shipping instructions. Those shipping instructions are entered in this book. We might order out hops a month or so before they go out of the warehouse, and the date that they were ordered out is shown in this book.

The Court. Explain how that comes about,

that they remain there so long after.

- A. Our business is all handled from San Francisco and these lots are in the East. We make an order of shipment. Our instructions are to ship, and there is a line for a certain time and we order those hops to go out, and they may go out on shipments two weeks from now. We make an entry in the stock book the date we order them out.
- Q. Would it be possible for a representative, like Mr. Farrell, to take this book and check them over?

A. No, sir, it would not. The same things holds good as to the 404 bales in New York.

Q. Show me where the entries are in the books.

A. I could not show you from this book.

Mr. Powers. I move to strike out the testimony with reference to Chicago and New York goods unless some entry is shown where they are contained in the books.

The Court. That is not the proper way to

reach it. I will deny that motion.

Mr. Powers. Exception.

Exception No. 80."

Again (pp. 265, 266):

"Q. (To Witness) How are you able to make up this paper headed, 'The location of 2000 bales of Cosumnes hops, November 4th, 1912'?

A. Because we knew 1503 bales were sold after November 4th, of which 497 bales of hops on previous sales were delivered after November 4th on such previous sales. We knew the lot numbers of those, and we knew the lot numbers of the 3062 bales on hand November 4th, so it was a very simple matter, having that information, to take out the 2000 bales, delivered after November 4th, on the account of Pabst.

NOBODY BUT THE BOOKKEEPING ASSISTANT WAS ABLE TO FIND FROM THE BOOKS WHICH ENTRIES APPLY TO PABST GOODS.

Nothing was done, no entry made in the books, or mark made on the bales themselves to indicate which were the Pabst and which were the Horst hops used in these contracts.

None of the 494 bales allotted to Horst were used on contracts where prices were in excess of twenty cents. The Court refused to allow us to ascertain the prices which were obtained for the 1062 bales allotted to Horst on these contracts although Mr. Horst volunteered that some went as high as twenty-six cents.

There was no attempt on the part of the Horst Company to prove the manner of keeping their books; they testified they kept none in New York and Chicago; they did not attempt to prove any entry therein as to sales or expenditures in the Chicago and New York offices nor to prove any fact concerning the transactions themselves by any person who pretended to know anything about the transactions themselves.

Only such vouchers as their bookkeeping assistant saw fit to introduce were introduced.

At the end of February, 1912, the hops were practically all sold (p. 79). On May 1, 1913, there were 34 bales on hand and on June 1st, there were 16 bales on hand (p. 183).

Thirty-four bales amounted to 6800 pounds. Horst swore these were worth 12¢ a pound. In other words, while there was \$816 worth of Pabst goods on hand establishments were being maintained where rent for the New York office was \$100 and one man was paid a salary of \$500 per month and another man was paid a salary of \$350 per month to sell them, when they could have been sold by paying from ½ to 2% commission, the Court allowed the expenses for these months to be used as a part of the overhead charges charged proportionately to the Pabst Company's goods and refused to allow the question:

"Was it necessary to maintain an office in New York with a manager's salary at the sum of \$500.00 a month in order to sell 16 bales of Cosumnes hops?" (p. 184).

With reference to the salary of the manager of the New York office, Mr. Lange testified:

"in November and December 1912, he got \$350 and in January, February and March, 1913,

the salary was \$500. I do not know why the salary was raised. The number of bales of Cosumnes hops on hand December 1912, was 1246. I do not know where the Pabst goods were at that time" (p. 186).

#### Also

"the salary of the manager of the Chicago office was \$350 and he had an assistant whose salary from November to July was \$975" (p. 187).

### Question was asked:

"What services, if any, did the stenographer perform with reference to the Pabst goods if

you know of your own knowledge?

A. You are segregating an item according to the Pabst goods when all of the services were rendered for all of the goods that were sold at that time.

Mr. Powers. I move the answer be stricken out as not responsive to the question.

The Court. Motion denied.

Exception, (p. 188).

Q. You do not know what services he performed, if any with reference to the sale of the Pabst goods at that time?

The Court. It would not make a particle of

difference.

Mr. Powers. I want to get a few of these items. With reference to the various items that go to make up the \$37.50, for instance, exchange, December 31st, seventy-five; stamps for office \$4.00. You have no means of knowing what those stamps were used for, or what that exchange was for, of your own knowledge?

A. As far as I am concerned, I was not there watching the stamps go out, but I can say what

the stamps were probably used for.

Q. You do not know of your own knowledge?

The Court. They may have rolled them up and made cigars out of them.

A. I do not know. That is the regular of-

fice expense (p. 188).

Q. Of your own knowledge you do not know what they were for, the expense of the stamps? (p. 189).

A. I do not know.

The COURT. I presume that you are asking these questions for the purpose of moving to strike this out on the ground that he is testifying to hearsay?

Mr. Powers. Yes.

The Court. The motion is denied.

Q. Your answer would be the same as far as all of the other items are concerned of the

New York office, would it not?

A. In reference to my knowledge of them. I knew nothing about them other than these are expenses for running the New York offices. These are the expenses we paid to our men, and they came to us and we entered them in our books.

Q. But whether any portion of those expenses were applied towards the sale of the Pabst goods, or directed towards the sale of other goods, you do not know.

A. They were directed against the sale of the Pabst goods and other goods, whatever hops

we had to sell at that time.

Q. Do you personally know what was done with reference to whether there was any segregation or not of any portion of those expenses for those particular Pabst goods or not?

There are certain traveling expenses of trips taken in those vouchers, are there not? (p.

190).

A. Yes, there are. Here is one for \$11.20 for hotel bills, meals, fare, car fare, public

stenographer and berth for Mr. Fleger from Boston, Mass., to Providence, Rhode Island, and New York City.

Q. You do not know what services were per-

formed during that trip by Mr. Fleger?

A. No, sir, I was not with him.

Q. You do not know in what manner, if at all, his services were connected with the Pabst

goods?

A. Mr. Fleger is one of our salesmen and was endeavoring to sell hops. During the entire period that he was with us he was trying to sell hops. The Pabst hops were a part of the hops that we were trying to sell.

Q. You do not know of your own personal knowledge whether Mr. Fleger went on that trip, and whether it was taken in connection

with the Pabst goods or not?

A. No, he may have gone fishing for all I know.

Q. All you know about it is that it was entered in your books as a part of the expense of selling hops?

A. That is all I know about it.

The Court. All of your testimony with reference to these transactions during that period, regarding expenses of these eastern offices, is being given simply as a result of your examination of the books?

A. Entirely.

Mr. Powers. I move to strike out all of the testimony of the witness as to overhead expenses on the ground that the evidence on which it is based is hearsay.

The Court. The motion is denied" (p. 191).

Bookkeeping assistant Lange testified that he examined the books for the purpose of ascertaining the price at which the 2000 bales sold to Pabst Company were sold and that he examined all vouchers

and memorandum of sales sent on by the agents selling them and that he had figured out interest, insurance, storage, freight and tare, discount and losses by bad debts.

These were all introduced over the objection of Pabst Company as follows:

- (a) That the books were the best evidence.
- (b) That is called for conclusions of law, and
- (c) That it took for granted that there were a certain 2000 bales sold to Pabst Company and segregated by them without there being any evidence as to the said 2000 bales being set aside.
  - (d) That it was hearsay evidence.

After the Court had asked him certain questions, he overuled the objection.

The testimony on which the Court based its ruling was as follows (p. 153):

"How are you able to know that these expenses relate to these hops that you are testifying about.

A. On the 2000 bales?

Q. Yes.

A. They refer to all the hops sold by the

offices during that period.

Q. And the overhead expense relates to any other business transaction during that period, and you are apportioning them up?

A. The amount sold by the other offices the total amount of bales of hops sold during

that period.

Q. And the percentage that would apply to the 2,000 bales you arrive at simply by figuring? A. The percentage that would apply to the 1346 bales.

The COURT. The only means, then, by which you arrive at these figures is by taking a certain percentage of the overhead charge in proportion to the number of pounds of hops sold, the 1346 bales, and you take the proportion of the 1346 bales to the entire amount of business transactions, or the volume of business, during the period that you were engaged in selling those 1346 bales?

A. The entire transactions, the volume of business done through those offices. These costs refer to those offices only.

The Court. I do not think that is admis-

sible (p. 155).

Mr. Devlin. Let me make it a little plainer. Some of the hops of the 2000 bales were sold in San Francisco, 200 bales or so.

 $\Lambda$ . Yes. There is no charge made for that at all.

Q. There were certain number of those bales, about 500 and odd, that were sold on prior contracts?

A. There were 497 bales sold on prior contracts and we have not made any overhead ex-

penses on them.

Q. Beginning on November 4th, 1912, until you finished selling the remainder of the bales, about 1300 and some odd bales, were there certain expenses incurred in New York and Chicago and eastern states in selling the remainder of the 2,000 bales of what we call the Pabst hops and other hops?

Mr. Powers. I object to that as hearsay.

The Court. Objection overruled.

Mr. Powers. Exception.

A. Yes, sir. That appears on the books of the company. We have not charged our own commission for selling the hops."

#### At p. 156, he testified:

"I am familiar with the delivery of these hops to eastern agents after November 4th. until the last of those we call the Pabst hops were sold. The statement showing hops on hand I got from the books. I made an examination for the purpose of ascertaining the amount of hops of the 1912 growth at the Cosumnes ranch on hand in November, 1912, and the amount sold. The number of bales of hops in 1912 that were on hand on the Cosumnes ranch on November 4th, 1912, was 3,062 Some of them were at the Cosumnes ranch in our warehouses; some of them en route to the east: some of them were at Milwaukee and some of them at Chicago and some of them at New York. I have charge of the stock room and the books, and I know the stock that goes out and where it goes to, and I know where the 2000 bales of hops were sold, and that afterwards returns were made by our agents stating where they were sold and the prices that they obtained, and I know the salaries that were paid to our salesmen during that time, from the books, and I know the expenses that were incurred.

Q. And they related to the 2,000 bales of hops, and also to the other hops?

Mr. Powers. I object to that as being hear-

say.

The Court. Objection overruled.

Mr. Powers. Exception.

#### Exception No. 41.

The Court. You know that in the ordinary course of business?

A. Yes.

Mr. Powers. Exception.

Q. And did the corporation E. Clemens Horst Company pay these expenses and these salaries, based upon those statements?

A. Yes. They were paid before this suit was commenced in the ordinary and usual course of business.

Mr. Devlin. I will take your Honor's rul-

ing now, if you think it is not proper.

The COURT. With this explanation I think it is quite proper.

Mr. Powers. Exception.

#### Exception No. 43 (p. 158).

Q. Did you make a calculation, without giving it now, as to the proportion of the expense these 1300 bales bore to the total expense, that

you have just described?

Mr. Powers. I object to it as irrelevant, and immaterial, calling for the conclusion of the witness on a question of law, which he is not competent to decide, and it is necessarily based on hearsay as to services performed by various people in connection with the Pabst goods, and in connection with other goods, and as being an attempt to put into the record evidence which should be obtained from the men who made the expenses, and thus know why the services were performed and what the expense was. For instance, there was a Christmas present included amongst these. There are stenographer's salaries included amongst them. There is a trip to Chicago.

Witness. The items of expenditures with reference to the business of this corporation so transacted in New York or in any other place in the east are sent on here and entered in our books here in San Francisco in the regular and orderly course of business. The reports come daily and weekly. A slip is made out by each salesman every day, but they do not

always send them then.

The COURT. Under those circumstances I think it is perfectly competent. The nature of the business transactions of this corporation

involve certain overhead charges as they are called (p. 159). There is a charge for regular salaries and for the expenses of transacting the business. Now, that business was, and the witness is competent to testify, of a certain volume, and making up of that volume was the disposition of this 1346 bales of hops which it is claimed here was disposed of on behalf of a broken contract with the Pabst Company. Now, they propose, and I think they are correct, to ask for, if they are entitled to damages, if the jury finds they are entitled to damages, the proportionate amount of the overhead charge which would apply to transactions involved in disposing of the 1346 bales of hops being returned to them. I think they are entitled to it, if the jury finds that they are entitled to recover at all. I will overrule the objection.

Mr. Powers. Exception (p. 159).

The sales book is in daily use. It took me five or six days to make this examination.

Q. Have you made correct estimates on the basis that you have given to the Court for your calculations?

Mr. Powers. I object to that on the ground that it calls for the conclusions of the witness on a question of law. There were sales of certain portions of these 2000 bales during the months of November, December, January and February, and the amount of goods left was, of course, diminishing. Now, the witness is asked whether or not he made a correct statement of it.

Q. Did you figure out mathematically correctly the amounts upon the basis you have given in your testimony? (p. 160).

Mr. Powers. I object to that on the ground already stated, and on the further ground that it is necessarily based on hearsay evidence.

The Court. Objection overruled. Mr. Powers. Exception. Exception No. 45."

#### And at page 161:

"Q. Please state what your examination discloses to have been the price obtained from the resale of the 2,000 bales of hops that it is claimed was sold to Pabst Company and re-

fused to buy it?

Mr. Powers. We object on the ground that it is irrelevant, based on hearsay evidence, based on a conclusion of law as to what is a proper method of apportioning; based upon an improper theory that the 2000 bales shall pay a proportion of the entire overhead expenses from November 4th, 1912, until the last bale was sold.

Mr. DEVLIN. I will change that question.

Q. Have you made an examination of the books of plaintiff for the purpose of ascertaining what the books show was the loss that had been sustained by the plaintiff measured on the assumption that the hops were sold to Pabst & Company at 20¢ per pound, and what plaintiff actually received for the hops, together with the cost of reselling them? Have you made such an examination?

A. Yes. And I have made the calculation just described for the purpose of ascertaining

that fact.

Q. Will you please state the result.

Mr. Powers. I repeat the objection, that it is based on hearsay evidence as to what was the cause, and the reason for the several expenditures reported from the Eastern states.

The Court. Objection overruled.

Mr Powers. Exception.

A. The 2000 bales were resold at an average price of .1366c.

The COURT. We do not want the average rate at all. We want the actual amount you received on the sale of these hops. Based on the figures that you have heretofore given.

A. \$23,584.80. \$32,651.73 plus several items that I have tabulated in accordance with my previous testimony. I figured the overhead to

be \$4459.30."

And thereupon the witness produced a tabulated list of office expenses shown at pages 163 to 179 of the transcript, which includes expenses in November, 1912, such as taxi, tips, bag boy, porters, car fare, phone calls, telegrams, \$7.40. In February, 1913, when Mr. Horst testified that practically all the Pabst hops had been sold, stamps \$10.00. In May, 1903, when there were only 34 bales of Pabst hops unsold, expense account \$209.50, and included Fidelity Whs. Co., \$22.64; N. Y. Tel. Co., \$33.50; rent \$100.00; Foster Scott Ice Co., \$3.25;

During the same month in Chicago, stenographer's salary \$12.50. During the same month Irving G. Markwart's expenses including expense of cigars \$.25. Merchants' credits as a salesman from November, 1912, to July 1, 1913, amounted to \$975,00, \$125.00 a month.

He also testified (p. 182):

"When you made up the price for which certain goods sold, how did you determine what portion of the 2000 bales should be used to fill that order?

A. Well, these are all the sales of Cosumnes hops since November 4th, 1912, that are included in this list. There were 1346 bales by

the eastern offices, and 494 bales by filling contracts already in existence. The remaining 1062 bales were also delivered on previous sales."

Again the question was asked Mr. Lange, by Mr. Powers (p. 186):

"Q. On January 1st, 1913, how many Pabst goods were on hand unsold?"

And the Court ruled of its own motion:

"I regard this as very immaterial, unless you

show me that it is material.

Mr. Powers. They raised the salary of the New York man when the amount of goods was less to be sold, and it shows that there was no connection whatsoever between the amount of Pabst goods to be sold and the

expenses.

The Court. That does not make any difference. A man transacts his business in a certain way. There comes a time when he feels that an employee's services are worth an increase in salary. Now the particular condition of the business with reference to any one transaction is wholly immaterial. It is immaterial as relating to a particular transaction except in so far as it may properly be charged to the proportional amount of the entire expenses of that transaction. I cannot permit you to go into this in such minute detail.

Mr. Powers. Exception."

# THE ENTIRE CASE OF HORST COMPANY AS TO DAMAGES WAS BASED ON HEARSAY EVIDENCE.

Thus it will be seen that Horst Company's entire case as to amount of damages rested on hear-say testimony of Mr. Lange, who was not its book-

keeper but an assistant of Mr. Horst in San Francisco and who was in no way connected with the sales department in Chicago, and New York.

He, alone testified as to the costs of maintaining the Chicago and New York offices and expenses incurred in selling this uncertain unidentified 2000 bales of hops by him called Pabst hops and he and Horst alone testified to prices obtained therefor from November 5, 1912, the date defendant rejected Horst Company's samples unto July 1, 1913, the day when the very last bale of "air dried" hops manufactured by Horst Company were sold.

# NOBODY CONNECTED WITH THE TRANSACTIONS OR ORIGINAL ENTRY OF THE TRANSACTIONS TESTIFIED.

Using these figures received by unverified written reports from Chicago and New York as a basis, Lange sometime in 1914, while preparing testimony for use in the trial of this case empirically pro rated the cost between a portion of two thousand bales which were assumed to have become the property of Pabst Company on November 5, 1912, and certain other bales which were in Horst Company's hands for sale at the same time on the basis of number of bales on hand on November 5, 1912. No witness party to the transactions was introduced to prove a single expenditure nor the connection of any expenditure with sale of goods on hand at the time the transactions referred to were made

nor the connection of the hops on hand with the respective transactions.

Lange specifically stated that he did not know whether the transactions occurred as reported or not.

Mr. Horst testified likewise as follows:

"The New York office took care of rejections of other goods than Cosumnes hops and of all other business. Everything that was pertaining to our business they took care of there. I did not know personally what was done by each man when he went out on a trip other than by the knowledge I gained from what he told me" (pp. 120, 121).

Mr. Horst was the only witness who testified to the sale prices of the so-called Pabst hops besides Mr. Lange. They both testified from the contents of written reports made by employees in Chicago and New York who were not sworn and whose names were not given but neither the facts nor the reports were introduced in evidence.

Pabst Company was thereby refused the right to crossexamine any witness as to the actual sale price and expenditures connected with the so-called 2000 bales of Pabst hops.

#### AS TO BAD ACCOUNTS INCLUDED IN OVERHEAD.

The so-called overhead charges included a selection of the bad accounts and low price sales of the Horst Company during the years 1912-3 and charging them partly to Pabst Company over the objections and exceptions of the Horst Company.

## For instance Lange testified (p. 148):

"The miscellaneous charges consisted of storage charges, local freight, cartage and weighing, sampling, repairing and any other charges like that that we could have the vouchers to cover.

Q. Have you stricken out of that list all expenses in connection with trips to Canada and things of that kind?"

### And the witness replied:

"Mr. Devlin, that would not go under these miscellaneous charges. That would go in under overhead. There are discounts to brewers for cash payments."

It must be remembered that Mr. Horst testified that goods like the Pabst Company's could not be sold in Canada at a fair rate because of the tariff in Canada (p. 118).

The most flagrant of these abuses was that of the bad accounts.

The witness testified (p. 151):

"There is a list of bad accounts, uncollectible accounts \* \* \* These items were collected. We invoiced them at a certain price and got a less price. We had to collect them through collection agencies and we got a less price. We have not been able to collect at all for them. We lost the money.

The Court. Were those sales made in the usual and ordinary course of business transac-

tions of that kind?

A. They were beyond our control. Q. Bad accounts you call them?

A. Yes. At the time we sold them, the breweries were considered all right, and there

was nothing to show that we could not get our money from them. They were sold in the regular course of business, the same as any other.

Mr. Powers. I object to any testimony as to bad accounts on the ground, first, that there is no particular 2,000 bales set aside to the Pabst people, and when there were 3,000 bales on hand there was nothing to show, at the time the original sale was made, that these were sales made for the Pabst Company account, or the goods of Pabst & Company. Second, when the Horst people sold those goods they then took those accounts in place of the claimed account against the Pabst people, and it is immaterial and irrelevant, and based upon hear-say testimony, as to whether these people are able to pay or not."

It will thus be observed that this witness was permitted to testify from written reports made by the Chicago and New York managers, that certain sales made by them to brewers of goods which at the time of the sales were in no way connected with Pabst Company were sold in the usual and ordinary course of business and that the brewers subsequently became unable to pay their bills and that the losses thus accrued under circumstances that they were not able to avoid.

In other words, the theory of Horst Company was that they were bailees of 2000 bales of Pabst hops. They intermingled these hops with their own hops. They sold the hops thus intermingled and such of the customers as subsequently proved to be incapable of paying, were charged to the Pabst account as if sold to Pabst at the prices incurred

thereby making the Pabst Company the insurer of their sales. And the testimony of the parties connected with the dealings was denied Pabst Company because the Court refused to follow the rules of evidence requiring that some person connected with the original transaction testify so that the other party to the transaction would have an opportunity to cross examine. At the time of the sales no attempt was made to charge them to Pabst.

It will be observed that never at any time has any respresentative of the Pabst Company had an opportunity to investigate any of these transactions.

# AS TO ERROR IN ACCEPTING SALE PRICE IN THE EAST AS MARKET PRICE.

Horst admitted that Sacramento was the natural market for Cosumnes goods but testified that his hops could not be sold there. He did not claim that hops equal to 25 to 38 could not be sold there.

The other experts testified that choice Cosumnes hops could have been sold, and others were sold, to the amount of 2000 bales for from 17 to 21 cents in November 1912, in Sacramento.

#### Mr. Horst testified at page 72:

"Sacramento would be the nearest Market. The most of the business would be done in Sacramento hops in Sacramento. It would not be possible to market that quantity of hops in Sacramento at that time, at a profit. There is

really no such thing as a market price for hops because hops are sold on private contract and are sold in advance.

### Mr. Otto J. Koch testified (p. 297):

"I am a buyer in the Sacramento market. I was familiar with the hop market in 1912. The market for Cosumnes hops at that time was 17 to 17½ cents for choice hops. I attempted to buy them at that time. I wanted to buy 1000 bales if I could get them, choice air dried Cosumnes hops of the character cured by Mr. Horst. At that time I would have bought them at that figure. This price 17 to 17½ cents was the price to the grower. I turn them over to George Proctor, who is a dealer. The commission for a broker in this market is one-half a cent. do not know what the commission is for a broker selling from a dealer to a brewer. The market for choice Cosumnes hops in 1912, was strong."

#### Mr. Mahan testified (p. 292):

"I put all my hops in together in the season of 1912. I sold my hops to Nebius & Drescher, who were also dealers in the Sacramento market."

Irving S. Marks was a hop buyer throughout the Sacramento Valley for sixteen years near Sacramento (p. 246).

# He testified (p. 250):

"In November 1912, the value of the choice air dried Cosumnes hops was 17½ to 18 cents. The Court. Could you have disposed on the market at that time of 2000 bales of Cosumnes hops at 17 to 18 cents?

A. Within a time I could. It might have taken six weeks. The reasonable value of the service of a broker in selling hops from grower to dealer was half a cent a pound.

#### Mr. Sweeney testified:

"He was a hop merchant for thirty years, was familiar with the value of air dried Cosumnes hops in November 1912. There was a sufficient market for air dried Cosumnes hops in 1912 to take 2000 bales. The price was 183/4 cents from grower to dealer (p. 257). and 201/4 to 221/2 cents from dealer to brewer (p. 258). If we had cut the price one cent on 2000 bales of Cosumnes hops it would have taken two or three weeks to have sold them (p. 271). I, myself, would have bought choice air dried Cosumnes hops in Milwaukee in 1912, as cheap as I could. I pay in November 183/4 cents and 18 cents out here on the coast for choice Cosumnes hops. They were absolutely the same commercial value as air-dried Cosumnes hops."

## Also (p. 271):

"In November 1912, I, myself, sold 1500 bales. With reference to sale of choice hops to brewers the market at that time was 22 to 24¢ and there was a demand."

#### Mr. Drescher testified (pp. 88-90-93-95-96):

"He was a hop merchant for forty years in Sacramento County. Bought and sold for many years (p. 88). With reference to price of choice Cosumnes hops during the month of November 1912, the market price obtained at that time was 17½ from dealer to dealer. Also (p. 90). He also testified (p. 95). I imagine I sold a thousand bales between November, 1912, and

March, 1913. On November 14th, we sold to Faulk-Wanzer 210 bales at 19¢ delivered in California, f. o. b. Sacramento; December 23, 1912 to Geo. A. Proctor 200 bales, at 17¢. January 4, 1913, to A. Magnus & Sons, 110 bales at 171/3c. January 4th, 78 bales at 171/3. Feb. 7, 1913, 300 bales at 171/5¢, and 321 bales at 18¢. Some of them were Cosumnes hops and some coast hops. 621 bales were Cosumnes hops. Between November, 1912, and March, 1913. I sold two orders to two different people. I think 2,000 bales of choice Cosumnes hops in November, 1912, from the inquiries made at that time would have been sold in a reasonable time, I would say twenty or thirty days. depending on the efforts made to reach the market,—not for 20¢, but for 17½¢. market value of choice air-dried Cosumnes hops from November, 1912 to March 1913, was between 171/se to 19 cents, and the market would take as high as 2000 bales. If they were offered at ten cents a pound in November, 1912, they would be taken up at once. If they were offered at 16c a pound I believe it would not have taken to exceed ten days. If offered at 161/5¢ it may have taken a few days longer. It would depend on how actively anyone had offered them. There was a good demand for that class of hops. The proportion of choice hops in the season of 1912, was smaller than usual, owing to the fact of the crop having been damaged by rain towards the latter end of the picking season. \* \* \* The choice hops other than air-dried Cosumnes hops, were fairly well sold out during November 1912. There was a good fair demand for choice air-dried, Cosumnes hops during the season from November, 1912, to March, 1913. The demand was stronger for choice hops at that time than for the lower grades."

There was no effort whatsoever on the part of the Horst people to prove what was the market price of Cosumnes hops in the East at the places where the goods were sold and the Court accepted the sale price given by Horst and Lange as the market price where sold. These sales were made by third parties and neither Horst nor Lange claimed to know what the market was at the places sold.

The only expert that they produced who ever sold hops testified (p. 210):

"Q. In November, 1912, were choice hops in demand."

A. No, not in demand. Occasionally, yes, you would get an order, you know, I do not sell much to brewers. \* \* \*

Q. Medium Cosumnes at times were a drug on the market, but choice Cosumnes were in demand?

A. Choice hops are always in demand. They always want choice hops."

All the witnesses testified that Horst "air dried" hops were commercially the same as other Cosumnes hops.

# MANNER OF RAISING POINTS AS TO IMPROPER ENTRIES IN BOOKS.

This point was raised as follows:

(a) Exceptions were reserved to the question asked the bookkeeping assistant as to whether or not he had made examination of the books to as-

certain the prices at which the hops had been sold, and the persons to whom they were sold and what books he examined.

- (b) Also what was the aggregate of the charges.
- (e) Also as to what the interest on losses was.
- (d) Also as to what the books showed were the expenses incurred in Chicago and New York.
- (e) Also as to the manner of application of storage charges, local freight, discount and the like.
- (f) Also as to the several items of overhead expense.
  - (g) Also as to bad accounts.
- (h) Also as to calculations as to what his opinion was as to the proportion of the expenses that the 1300 bales sold on Pabst account, bore to the total expense.
- (i) Also as to what his examination disclosed to have been the price obtained from the resale of the 2000 bales of hops that was claimed to be sold to Pabst Company from examination of the books themselves.
- (j) This also comes up by way of motion to strike out answer of the defendant Lange as to the sales having been made of 1920 bales on coast delivery prices.
- (k) Also by the refusal of the Court to strike out the testimony of the witness Lange concerning the losses because of bad accounts.

- (1) Also refusal to strike out the testimony of the witness Horst with reference to the prices for which Pabst 2000 bales of goods were sold.
- (m) Also by overruling objections to questions asked witnesses Horst and Lange concerning the expenses of the 1300 bales which were claimed to have been sold on Pabst account, because said witnesses were not shown to have had any information as to the connection of the several items with the goods sold on which to base a proper pro rating of the expenses for the sale of these particular goods which were sold contemporaneously with other goods then in stock, some of which were of similar character, and some of which were of dissimilar character and because the pro rating necessarily carried with it conclusions of law as to the manner of application of expenses under circumstances which existed at various times from November, 1912, to July, 1913.
- (n) Exception to the ruling of the Court refusing to strike out all of the testimony of witness Lange concerning transactions occurring in Chicago and New York and reported to the San Francisco office and by Lange tabulated and testimony as to storage, insurance, bad debts, bookkeeping, travelling expenses, stenographer, Christmas presents and other charges of that character.

- AS TO ERRORS IN ALLOWING EVIDENCE OF THE SALE PRICE OF UNIDENTIFIED SO-CALLED 2000 BALES PABST HOPS WHILE THE SAME WERE NEVER EAR-MARKED AS BELONG-ING TO PABST COMPANY.
- 4. The Horst Company conducted its business and handled its stock of hops after November 4, 1912 (the date of the rejection by Pabst Company of its offer of delivery) in the same manner that it had prior to that time.

No instructions were given to the Chicago and New York offices nor any of the employees to treat any particular lot of hops as being held by Horst Company as bailees for Pabst Company.

They claim they sold 1346 bales of goods in the market with all other of their goods as their own and filled existing contracts from other bales of the same class on sales already made and then when it came to prepare for the trial of this suit they selected such of the sales as were lower than twenty cents and considered them Pabst goods, and the Court refused to allow the jury to know the price obtained for the goods on hand which were sold at a price in excess of twenty cents.

We have already quoted the testimony of witness Lange on cross-examination (p. 182).

When referring to lots 523 and 524, Mr. Lange testified (p. 196) to question:

"Q. When were they made the basis of any charge against the Pabst Company?" as follows:

"A. When we made up our list of 2000 bales—just since we have been getting up statements of the account you have asked for."

In other words while preparing for the trial of the case in April, 1914, this bookkeeping assistant made a selection of such sales as had been carried on by Horst in 1912 and 1913 by selecting sales of 1346 bales instead of 1506 bales as for the Pabst account and selected 494 out of the 1556 bales used to fill contracts in existence by taking such as had prices less than 20 cents and this lot of 2000 bales thus selected over a year after the transactions occurred were called sales on account of the Pabst 2000 bale contract for Pabst Company.

Horst Company over Pabst Company's objections introduced testimony as to an undefined non-existing as an entity two thousand bales of hops called by the witnesses "the Pabst two thousand bales". At no time did any one, even Horst Company's employees physically see or know these two thousand bales or any of them while they were known as Pabst hops. At no time did any one make an entry in any book designating any particular bales as belonging to Pabst Company until long after the sale of all 1912 hops.

The total number of bales of hops produced by Horst Company on its Cosumnes ranch in 1912 was 4300 bales (p. 136). Of these 200 bales were what Horst called "clean ups" (p. 136). "Clean ups" is a term given by Horst Company to hops that were not of a choice character. Giving Horst the benefit of the doubt there were 4100 bales left

which were claimed by Horst to be choice hops of a uniform character. According to Mr. Horst's testimony one bale was not different in quality from any other. Mr. Lange testified that 494 bales of these hops were used to fill contracts in existence before November 4, 1912.

The uncontradicted evidence is that the sale books show that up to November 4, 1912, the date of the breach of the contract 2764 bales of these Cosumnes hops had been sold to persons other than Horst (p. 365) and on that date therefore Horst Company had 4000 bales less 2764 bales or 1336 bales and no more available for delivery. Hence the Horst Company lacked the difference between 2000 bales and 1336 bales—664 bales to fill its contract with Pabst.

Horst Company's testimony is that the bales that they had available for delivery to Pabst Company were of the Horst production of his Cosumnes ranch to wit, these 3062 bales (p. 366).

It is evident that in order to use as a basis for damage the actual sale price of any definite number of bales of hops, that there must have been sometime in which those bales were definitely established as being set aside for Pabst.

In this brief we will refer to it as we did in the trial of the case, by saying that they should have been "earmarked".

It is not our contention that Pabst would have been relieved from damages, were they held otherwise liable, because of the absence of the earmarks, if as a matter of fact Horst Company had on hand hops with which they could have filled its contract with Pabst Company, but it is our contention that it is error to establish damages by means of proof of what an undefined two thousand bales of hops which did not exist as entity were sold for by testimony as to sale price of hops used in filling contracts in existence on November 4, 1912, where from a large number of contracts filled by plaintiff, some carrying price as high as 26 cents, the Horst Company selected such contracts as were for prices less than twenty cents a pound for hops sold prior to November 4, 1912, and treated them as Pabst Company's sales and refusing to allow testimony as to the remaining contracts where the price was over 26 cents and in order to account for the remainder of 2000 bales to offer evidence as to results of sales of the other bales of hops while Horst Company was conducting its business, partly with the idea of developing new trade and partly with the intent to retain its old customers and for other general purposes not connected with Pabst Company or its so-called hops including co-operation with the San Francisco office in the sale of the remaining bales of 10,500 bales in said office on November 4, 1912.

#### MANNER OF RAISING QUESTION AS TO PROPER EARMARKS.

The question was raised as follows:

(a) By exception to the question asked witness Horst, "What did you do with these 2000 bales of hops that you sold for Pabst Brewing Company and they refused to accept?"

- (b) And by sustaining Pabst Company's objections to the question asked witness Horst, "What steps, if any, did you take to set aside that 2000 bales for the Pabst people on November 4, 1912, when the defendant notified the plaintiff that they would not take the hops offered", and other similar questions directed to the question as to whether or not any steps were taken to set aside or use any marks to indicate any portion of the bales which were then on hand for the Pabst people.
- (c) Also exception saved to question asked witness Horst, as to how he arrived at the selling price of the 2000 bales of Pabst goods.
- (d) Also as to whether or not certain expenses were incurred in New York and Chicago and Eastern states in selling a portion of the 2000 bales of Pabst goods.
- (e) Also the question as to whether or not items of overhead expense, such as bad accounts relating to the 2000 bales of hops belonging to Pabst.
- (f) Also as to his calculations as to the portion of the expenses that the 1300 bales bore to the total expense which had been described.
- (g) Also to the question asked, "Please state what your examination discloses to have been the price obtained from the resale of the 2000 bales of hops that it was claimed were sold to Pabst Company, who refused to buy them".
- (h) Also with the exception to the Court denying Pabst Company's motion to strike out the testimony of witness Lange, that most of the sales

made of the 1920 bales of the 2000 bales sold other parties after November 4, 1912, were sold on delivery prices, on the ground that it takes for granted the fact to be in evidence that there were 2000 bales sold on account of Pabst Company.

- (i) Also the exception to the refusal to allow testimony as to where all of the 4500 bales which included the 2000 bales of Pabst Company, were stored.
- (j) Also the refusal to allow the question as to delivery and dates of delivery of Cosumnes goods made on contracts which were in existence at the time of the commencement of the season in 1912.
- (k) Also refusal to allow the testimony as to what allotment of Cosumnes goods held by Horst when the Pabst Company's breach was made to the various contracts then existing.

# AS TO ERROR IN ALLOWING PROOF OF PRICES IN FEBRUARY BASED ON ALLEGED CUSTOM AS TO DELIVERY.

5th. The correspondence on which the contract is based was silent as to the dates of delivery of hops covered by the contract, although a draft of contract submitted by Pabst Company called for shipment before December and another draft of contract submitted by Pabst Company called for shipments, October to March. Neither draft was executed by both parties, and Horst Company attempted to prove a custom, to wit: that the time of delivery was any time up to March of the year

following the harvesting of the hops and this custom was attempted to be proven by what Horst Company itself *alone* did on one or two occasions and not what was the universal custom by people buying and selling hops.

Am. & Eng. Enc., Vol. 29, p. 367.

Mr. Horst admitted, however, that when he sent a contract to Pabst, referring to this 2000 bales sale, that he arranged for delivery September and December (p. 111).

Mr. Drescher who had been in business for forty years in Sacramento testified (p. 94), that there was no such custom.

No person other than Horst testified to this custom. Horst then attempted to establish the price of hops in the month of February, 1913, at the nearest market, to wit, Sacramento, as 11 and 12 cents a pound, concentrating his testimony in February, 1913. Several other dealers showed the actual purchase and sale of Cosumnes hops up from 500 to 2000 bales at 17½ to 18¾ cents in November, December on.

### THE MANNER IN WHICH THE QUESTION WAS RAISED.

During Horst's examination, the following proceedings took place (p. 80):

"Q. State what, in your opinion, was the reasonable price that you could have realized for the sale of 2000 bales of air-dried, choice Cosumnes hops, if sold in that quantity, in the month of February, 1913, at the nearest market. Mr. Powers. I object to that as irrelevent,

incompetent and immaterial, and being an improper question. The contract, if breached at all, was breached in November, and the sale should have taken place then. The question should be directed to a reasonable time after the alleged breach. Also that it does not detail the proper time for the estimate for damages.

Mr. Devlin. Please state what was the market price that could be obtained in the month of February, at the nearest market for

that class of hops in February, 1913?

Mr. Powers. I object on the same ground.

The Court. Objection overruled.

Mr. Powers. Exception.

Exception No. 11."

# AS TO ERROR BECAUSE OF REJECTION OF TESTIMONY OF WITNESSES WHO TESTIFIED TO THE IMPROPER MANNER OF PICKING HOPS BY HORST COMPANY.

6. Mr. Horst testified that all hops produced by him were universally the same character in all the bales, save and except one small lot of 145 bales which he called "pick ups". The cleanness of the hops was a vital disputed point.

Pabst Company produced two witnesses who testified that they were present at the time these hops of Horst Company afterwards claimed by Horst Company to be of grade equivalent to samples 21 to 24, were being picked and dried and for over two hours they actually saw that the hop picking machine used by Horst Company was not in efficient running order but was so arranged that the stems and twigs and leaves were carried into the hops while the same were being

dried and baled and that the man in charge of the work told them he had instructions to let everything go into the hops because they had a large eastern order to fill.

Witness G. S. Chalmers testified (p. 302) as follows:

"The Court. Tell us what you saw.

A. I went there to see the picking machine run and it was running. The man who had charge of the picking machine was at the picking end of it and I asked him if I could look through it, and he said 'I will show you'. We went to the back end where the elevator was taking the leaves into the kiln. They had canvas along there to keep the leaves from going out. The stems and leaves were going into this elevator, and I said to the man, 'Don't you pick out none of the leaves'.

Mr. Powers. Q. What did you do about

an examination of the kiln?

A. I went up to the kiln, and the hops were powdered up in the kiln where they were drying. They went into the cooler room and there was a man there bailing them. They were going into a bale, then they were putting them out in the plains in the boiling hot sun with no

cover over them whatever.

There must have been fifty men working there, and the particular person we had the conversation with was in charge of the picking machine. I asked for Mr. Conrad and he said he was on another ranch and that he had charge of the picking machine at the time. He also said he would show me around. We walked along looking at the machine and to where the hops were going out of the elevator into the kiln. I do not think I could identify the man at the present time if I saw him. He was a large man. It was my first time on

the ranch. He was working actively. At the time he was. He had a long stick there and at times he would hit on the machine, and he gave orders to some Hindoos around there.

The Court. The witness will not be permitted to testify further unless you can show

the man in authority.

I went through the picking machine where they were picking; I went along to where the picking machine was and I asked him why they were letting the leaves and stems go in there, and he said, we have got a cheap contract and we have orders to let everything go in.

Q. What was the condition that you observed concerning the leaves and stems going

in, that lead up to this conversation?

A. Well, the thing that throws the hops out was not working at all. It was standing still, and that is how we came to talk about it. Then we went along the elevator that takes the hops up into the kiln.

The Court. The leaves and stems were

ground up and sent to the kiln.

A. The picking machine strips them right off, and the leaves and stems were going up into the kiln. You could not see many hops. There were no leaves or stems being thrown out by the machine at all, that I saw. What we call the drum was standing still. It was not running. The vines are pulled right through lengthwise and no leaves and stems are stripped off the best they can. What did not pull off they had a man outside picking them off, and they left the rest on, and a little stems, leaves and so forth went in with the The biggest stems were not sent up with the hops. They did not grind the vines up. The man said that they had orders to let everything go up in the kiln. That they had a cheap contract and the blower was stopped.

The COURT. All of this will have to go out. The witness has shown that he does not know anything about it.

All this evidence was stricken out by the Court over exception after it was introduced and much similar testimony was offered and refused by the Court over exception.

### AS TO ERROR IN REFUSING EVIDENCE THAT HOPS WERE TOO GREEN WHEN PICKED BY HORST.

7. The experts of Horst Company and Pabst Company differed as to whether the samples furnished by Horst Company to Pabst Company were properly rejected because the hops were immature when picked, that is to say, whether they were picked while too green to prevent them to have reached full maturity.

Experts in curing hops who were familiar with the hops grown by Horst Company and those raised in the vicinity of Horst Company's Cosumnes Ranch were offered to prove that at the time Horst Company's hops were being picked from vines of Horst Company that they were too green to be cured into a "choice hop".

Nevertheless the Court refused to allow the testimony as to the physical condition of Horst Company's hops addressed to its comparative immaturity or greenness when picked and when the Court discovered that the testimony of the witness Chalmers as to the greenness or immaturity of

Horst's hops at picking was not stricken out the Court interrupted the argument of Pabst's attorneys and ordered it stricken out under the following circumstances, viz.:

Mr. Chalmers testified that he had been in the hop business in the Cosumnes district for over thirty years. Without any objection being interposed he testified that the hops were picked too green; he also testified as to the manner of the Horst Company working the hop picking machine. He testified with reference to the hop picking, which testimony was stricken out and then the witness was recalled at the request of the attorney for the Horst Company and thereupon the witness was again interrogated concerning what happened at the hop picking house with reference to the picking of the hops and absolutely nothing was said upon his second appearance as a witness about the greenness of the hops.

At the conclusion of the witness' testimony when recalled the Court, of his own motion, said (pp. 364-5):

"The Court. This evidence should not be permitted to stand. It is absolutely indefinite.

Mr. Devlin. It is stricken out your Honor.

The Court. Yes.

Mr. Butler. Exception.

Mr. Powers. Your Honor has stricken out the conversation. How about the witness seeing the physical fact of the leaves going in?

The COURT. I am striking out the whole of it. There is nothing to connect it with the

plaintiff.

Mr. Powers. Exception."

Subsequently while the attorney for Pabst Company was arguing the case and referring to Mr. Chalmers' testimony in reference to the green condition of the hops the record shows that the Court permitted Mr. Devlin to interrupt argument and then for the first time the Court struck out the testimony as to the greenness of the hops.

The record shows (pp. 366-7):

"Thereupon Mr. Devlin interrupted as follows:

That testimony was stricken out. Counsel is now referring to testimony that your Honor

has stricken out.

Mr. Powers. Mr. Chalmers testified yesterday with reference to the fact that the hops were picked twenty days earlier. That has not been stricken out.

The COURT. All of his testimony went out.
Mr. Powers. Including that about the

picking?

The COURT. Yes, it was wholly irrelevant, The question is What was the quality of these hops when were they tendered to the defendant?

Mr. Powers. Exception."

The record also shows that Mr. Devlin and the Court were wrong with reference to the testimony as to the greenness of the hops being stricken out.

The record shows (pp. 303-4):

"Q. What was said to you by the man in charge with reference to the manner of bailing the hops, so far as the leaves and twigs were concerned?

Mr. Devlix. I object to that as irrelevant, immaterial and incompetent and hearsay.

The Court. The objection is sustained.

Mr. Powers. Exception.

Q. What was the condition of the hops in the Cosumnes district with reference to ripeness on or about August 12th, 1912?

A. They were green. Too green to pick. They ripened from about the 20th to the 25th of August. There were no hops ready to pick

before that.

Q. While you were at the Horst hop house, and seeing the picker at work in the manner in which you state, did the man in charge say anything to you about the manner in which he was picking hops so far as leaves and stems were concerned? (252)

Mr. Devlin. I object to it as irrelevant, in-

competent and immaterial.

The Court. Objection sustained. (Testimony of C. S. Chalmers.)
Mr. Powers. Exception.

We respectfully submit that not only was the Court wrong in making the order striking out the testimony de novo during argument of the case, but also that if he had made the order after a proper objection while witness was on stand, it would also have been error.

### AS TO ERROR IN INSTRUCTING JURY NOT TO CONSIDER COUNTERCLAIM.

8. The contract itself as finally made was one whereby Pabst Company agreed to accept hops of a character equal to four samples (samples 21 to 24) which we have called type samples which Pabst Company forwarded to Horst Company. These samples were not "air-dried" hops. Pabst

Company forwarded samples 25 to 38 which they claim to be equal to the four type samples sent, and these fourteen samples (25 to 38) thus sent by Horst Company to Pabst Company were not all "air-dried" hops. Consequently the parties themselves contemporaneously with the execution of the contract did not consider the so-called "air-dried" qualifications as a part of the transactions.

Defendant relied upon plaintiff's representations that they could furnish goods like samples and did not buy its requirement in hops in the market until after November 4th, when the prices were in excess of what the contract price was and the Court refused to allow the jury to consider the testimony on this basis in order to establish Pabst Company's counterclaim and refused to allow a witness to testify as to sales made to Pabst Company in November, 1912, and instructed the jury to disallow the counterclaim.

Gustav Pabst testified as to the necessary purchase by Pabst Company after November 4, 1912, of certain hops at a price in excess of twenty cents, testifying (p. 344):

"Because we had to have them in our business and to replace the hops which under the contract with E. Clemens Horst Company failed to deliver to us."

He then testified to the following purchases (pp. 344-5) viz.:

"On November 25th, 1912, 19,332 lbs. at 21c; 3108 lbs. at 23c; 19,441 at 22c; on November 14th, 1912, 16,837 lbs. at 22c; on November 13th, 1912, 16,988 lbs. 22c; on November 21st,

1912, 47,385 lbs. at  $22\phi$ ; December 24th, 1914, 16,496 at  $23\phi$ . At net prices which showed the purchase of 868 bales of 167,562 lbs. for the net at Milwaukee less freight of \$34763.57."

If Horst Company had fulfilled their contract these would have cost \$33,512.40. In other words Pabst Company was damaged \$1251.13 by the non-delivery of these 868 bales or 1.44 cents per bale and the jury had evidence before it to authorize the allowance of the \$2000 damages asked for by Pabst Company—certainly up to \$1251.13.

## AS TO ERROR IN ALLOWING GROWER TO TESTIFY AS EXPERTS WHEN THEY KNOW NOTHING OF THE MARKET.

9. A large number of hop growers who never had been party to the sale of any hops except those produced by themselves nor had any connection with sales to brewers and who knew nothing about the sale price of hops other than their own and who specifically disclaimed being hop experts, were permitted to testify as to the choice quality of samples of hops in question for sale purposes between the merchant and this brewer.

For instance, take witness Paul E. Peterson. He testified (p. 124):

"Was a grower for 25 years. Am familiar with the supervision and caretaking of hops. First grew them in 1912. Did not see the 1911 crop. I have sold hops. Generally sell my hops as 'choice hops'."

He was asked (p. 126) to examine samples 1 to 20 and to state to the jury whether you consider them in your opinion as choice hops.

Mr. Powers' objection on the ground he was not an expert on the question was overruled and exception.

The answer was "I consider them prime to choice", and then he testified to the character, flavor and choiceness of various samples (p. 127).

On cross-examination he testified (p. 128):

"I do not pretend to be a hop expert. My knowledge of hops has been gained by raising and selling them for about 25 years and about 3 years in the Cosumnes district. I have never bought hops for the market. \* \* \* I sold my hops for 22 cents. There were some hops of that character sold that year in November but I don't remember. I am not a hop buyer so could not tell".

### AS TO ERROR IN ALLOWING HORST TO INTRODUCE EVI-DENCE CONCERNING MAIN CASE IN REBUTTAL.

10th. On rebuttal Mr. Horst was asked by his counsel the question:

"In your testimony I asked you certain questions as to your ability to deliver 2000 bales of hops equal in quality to samples 1 to 20. I now ask you if, on November 4th, 1912, you had 2000 bales of hops on hand equal in quality to samples 21 to 24? (p. 365), and also, on that date, if defendant was willing to accept, were you able, ready and willing to deliver the 2000 bales of hops equal in quality to samples 21, 22, 23 and 24"?

His answers to these questions were that he would have been able to deliver them out of the 3042 bales of air-dried Cosumnes hops manufactured on his ranch.

These questions were identical in purpose with that which the Court had refused to allow Pabst's attorneys to ask the same witness during his crossexamination (at p. 99, Except. No. 5).

The witness had already testified to the matter in chief and this testimony was permitted in rebuttal after the Court had refused to allow Pabst Company the benefit of the evidence during the trial of the main case.

### THE SPECIFICATIONS OF ERRORS RELIED UPON.

The Court erred in rejecting all testimony except that referring to the Horst process of "air dried hops" and in limiting all questions to experts as to the price and market for hops of that description.

Categorically this comes by virtue of exceptions 38, 39, 40, 43, 67, 68 and 71, with reference to the purchase by Horst of Cosumnes hops for seventeen cents a pound in November, 1912, at a time when he testified that he had sold hops which he had offered Pabst people as a compliance with their contract to others for fourteen and fifteen cents a pound.

The questions are as follows:

"38. Q. Asked Witness Horst: Did you not in the latter part of November, 1912, buy some Cosumnes hops from Wolf Netter & Co.

- 39. Q. Did you buy Cosumnes hops of the same quality as air dried Cosumnes hops in the latter part of 1912?
- 40. Q. Did you buy hops in San Francisco of a character which was accepted by the trade as Cosummes hops which could have been used as a delivery on the four samples numbered 21 to 24, submitted by the Pabst Brewing Company to you?
- 43. Q. Did you buy hops in San Francisco of a character that was accepted by the trade as Cosumnes hops which could have been used as delivery on the four samples 21 to 24 submitted by the Pabst Brewing Company to you?"

Witness Marks was an expert who had been handling hops in the Sacramento market for many years, in buying and selling. There was no question made as to his capacity as an expert but he testified that he did not know "air dried hops" of the Horst process as distinguished from any other hops and the Court refused to allow him to answer the following questions:

- "67. Q. You have seen certain samples of the Horst hops. What would be the reasonable market value of a hop of the character of one to twenty (Horst hops) if it were choice, in the month of November, 1912?
- 68. Q. What was the reasonable value of choice air dried Cosumnes hops dried under a process whereby the hot air is put into the kiln from the outside?"

His testimony, if given, was that the value of such hops was 18 to 20 cents a pound in the Sacramento market in November, 1912.

The Court not only refused to allow witness Sweeney to testify to the value of hops other than the particular Horst process of "air dried hops" but announced that he would instruct the jury that only the Horst "air dried hops" were called for by the contract. Categorically the questions and instructions were as follows:

"71. The Court erred in requiring witness Sweeney to confine his testimony to air dried hops under the following circumstances:"

The same type of error was committed in the matter of refusal to allow the defendant to prove by witness Horst that samples 25 to 38 forwarded by him were not air dried Cosumnes hops of the character manufactured by him.

- "55. Q. Were the samples 25 to 38 of Cosumnes hops, all air dried Cosumnes hops, or were they other kinds of hops?
- 56. Q. Is there any way you have of refreshing your memory so that you could tell us?
- 71. The Court erred in requiring witness Sweeney to confine his testimony to air-dried hops under the following circumstances:
- Q. Asked Mr. Powers: Were you familiar with the value of Cosumnes hops in the month of the year 1912?

A. I was.

Mr. Devlin. I shall object unless the inquiry be confined to air-dried hops.

The COURT then said: He does not think that has any significance. I am bound to instruct the jury that it has. It characterizes the class of hops that are called for by this. Confine yourself to air-dried hops."

The Court erred in instructing witness Sweeney to confine his testimony to air-dried Cosumnes hops.

This is also covered by generic specification as follows:

"113. The Court erred in refusing to allow the testimony concerning the prices paid by plaintiff for Cosummes hops which were not airdried, but which were purchased by Horst in November, 1912, because Horst testified that some of the samples sent by him included in 25 to 38 were not air-dried, and all of the witnesses testified that the commercial value of air-dried Cosummes and other Cosummes were identical and Horst himself testified that he could not tell the difference between the air-dried and the kiln-dried Cosumnes hops when they were in the market (p. 431).

133. The Court erred in refusing to allow any testimony except as to air-dried Cosumnes hops because the contract as finally confirmed referred to hops equal to samples 21 to 24, and the contemporaneous interpretation of the contract by both parties was that any hops equal to those samples should be accepted, and witness Horst testified that the samples 25 to 38 were not air-dried, and witness Lange testified that he did not think they were all air-dried Cosumnes hops" (p. 439).

#### CONCERNING BOOKKEEPING ENTRIES.

The Court erred in overruling defendant's objection to questions asked witness Horst as to amount of travelling expenses, insurance, and the like. This is covered by specification 7. And also in the following specific instances, viz:

"15. Q. Asked witness Horst: How much do you estimate that the overhead expenses were

increased by the fact that you had to sell through agents in Chicago this 1500 bales of so-called Pabst hops?" (p. 394).

### Also as to questions asked witness Lange:

- "17. Q. Have you made an examination of the books for the purpose of ascertaining the price at which they (the hops of plaintiff) were sold and the persons to whom they were sold and what books did you examine to do that? (p. 395).
- 18. What is the aggregate of the miscellaneous charges for the sale of Pabst goods?
- 19. Q. Asked Mr. Lange: Did you figure any interest on losses? (p. 396).
- 20. Please state what you put into the selling cost and how you arrived at it to be distributed to these 2000 bales? (p. 397).
- 21. Beginning on November 4th, 1912, until you finished selling the remainder of the bales, about 1300 and some odd bales, were there certain expenses incurred in New York and Chicago and Eastern States in selling the remainder of the 2000 bales of what we call the Pabst hops and other hops?
- 22. And in lieu of a cent and a half a pound, you are simply giving here a proportion of the overhead charges in the New York office for selling these 1300 bales of hops. Is that correct? (p. 398).
- 23. Overruling objections to a series of questions asked witness Lange concerning his examination of the books and the vouchers and his application of storage charges, local freight, cost of calculation, discount and the like."

### And also:

"Q. Explain the other items of overhead, such as bad accounts (Exception No. 35)."

And also the question referring to the salaries paid to the salesmen and the charges of the stock-room and the like, viz:

"And they related to the 2000 bales of hops and also to the other hops? (pp. 398-9).

- 24. Did you make any calculation as to the proportion of the expenses these 1300 bales bore to the total expense, that you have just described? (p. 330).
- 25. Have you made correct estimates on the basis that you have given to the Court for your circulation? (p. 400).
- 27. Please state what your examination discloses to have the price obtained from the resale of the 2000 bales of hops that it is claimed was sold to the Pabst Company and refused to buy it?
- 28. Will you state the result of the examination of the books of the plaintiff for the purpose of ascertaining what the books show was the loss that had been sustained by plaintiff measured on the assumption that the hops were sold to Pabst Company at 20 cents a pound and what plaintiff actually received for the hops together with the cost of reselling them? (p. 401).
- 29. The Court erred in allowing all questions concerning the entries in the books to witness Lange with reference to the connection that the several expenses incurred during the months of November, December, January and February had to the 2000 bales of Pabst goods, or to the defendant (p. 402).
- 31. The Court erred in denying defendant's motion to strike out the answer of witness Lange that the most of the sales made of the 1920 bales of the 2000 bales sold other parties after November 4, 1912, were sold on delivery prices, on the ground that it takes for granted

the fact to be in evidence that there were 2000 bales sold on account of the Pabst Company (p. 402).

88. The Court erred in refusing to strike out the testimony of Lange concerning the overhead charges, insurance and the like because it was hearsay testimony. The substance being that certain entries made by other from transactions carried only employees in the east showed certain charges (p. 424).

89. The Court erred in refusing to strike out the testimony of witness Horst concerning the existence of the 2000 bales belonging to defendant at the time of the breach, on the ground that he referred to records to show their whereabouts and refused to produce the records and testified that none were 'earmaked' to identify them as defendant's property (Exception No. 61) (p. 424).

90. The Court erred in refusing to strike out the testimony of witness Horst, with reference to the portion of the 3062 bales of hops which were designated by him as Pabst goods, or being used by him for the purpose of completing the Pabst contract, because the substance of the testimony showed it was impossible to determine that there were 2000 bales on hand on November 4, 1912, or what was the price paid for any hops available to be used to fill the Pabst contract and because simultaneously there were other goods in the 3062 bales then on hand sold for higher prices which were not in any way earmarked as belonging to others but which were not included in the Pabst sale (p. 424).

92. The Court erred in overruling plaintiff's objections to the testimony as to losses incurred for bad debts and uncollectible accounts, for goods claimed to have been sold on account of the Pabst Brewing Company at the time the

sales were made they were not made for the Pabst account but subsequently when the losses occurred, and plaintiff then claimed that they were Pabst's sale (p. 425).

93. The Court erred in refusing to strike out the testimony as to loss by bad debts (Ex-

ception No. 36).

- 95. Also the Court erred in denving the motion to strike out all of the evidence of overhead charges depending upon items that were not shown to be directly connected with the 2000 bales of Pabst Brewing Company goods, or the goods that Horst set aside for Pabst Brewing Company, which had been designated to fill the order of Pabst Brewing Company. because it was based on hearsay evidence of the manner in which the expenses were incurred, irrelevant, and immaterial and conclusion of the witness as to how much of each particular account should be charged and was based on matters that lav partly in law and partly in fact and calling for the conclusions of the witness on questions of law (p. 426).
- 96. The Court erred in overruling the introduction of the calculations of the witness Lange as to interest, storage, freight on tare, insurance, local freight, on the ground that it was not shown to be connected with the 2000 bales of hops that were used for the Pabst shipment, and based on hearsay evidence and were conclusions of the witness in matters of law (p. 426).

97. The Court erred in refusing to strike out the answer to the following question asked witness Lange:

Q. What books did you have to examine to find the price at which the 2000 bales of

Pabst hops were sold? (p. 426).

98. The Court erred in refusing to strike out the answer to the question:

Q. Did you figure any interest on losses as follows?

A. I figured the difference between the price we sold to Pabst and the price we sold

to the other parties.

Because it is not responsive to the question and was necessarily hearsay, and also refusal to strike out portion of the answer to the same question reading as follows: (352)

'Most of the sales made of the 1920 bales of the 2000 bales were sold other parties after November 4, 1912, were sold on delivery prices.'

Because not responsive to the question and

necessarily based on hearsay (pp. 426-7).

99. The Court erred in refusing to strike

out the answer to the question:

Q. What is the aggregate of the miscellaneous charges, storage, local freight, cartage, sampling, repairing and any other charges you could have vouchers for?

The answer being in substance as follows: 'We know just what lot those items cover.' It not being responsive to the question and being necessarily hearsay (p. 427).

100. The Court erred in overruling the objection to the question asked witness Lange:

Q. What is the aggregate of miscellaneous charges consisting of storage, local freight, cartage, sampling and other charges like that which you could have vouchers to cover?

The substance of the answer being, that he figured interest at six per cent, the sale being the 1920 bales sold other parties after November 4, 1912, on delivery prices and that there was various freight rates covering these sales: there was freight on tare and items of storage on hops on November 4th on and there was one per cent discount allowed certain brewers and that there was certain bad accounts due and uncollectible, the difference between the

amount of the invoices and the amount collected (pp. 427-8).

108. The Court erred in permitting any testimony based upon the books of the plaintiff because there was not evidence introduced to show that the books were regularly kept. On the contrary the evidence showed that many of the entries were made temporarily to be subsequently changed, and because one of the persons who made the entries in the Chicago and New York offices testified as to the correctness of the records, nor that the entries were made simultaneously, with the transactions, nor that they were correct transcript of original entries made simultaneously on about the time of the transactions in question" (p. 429).

## Error as to Incorrect Method of Keeping Books and Neglect to Introduce Books.

"109. The Court erred in allowing any of the entries in the books until they were shown to have been made by some person who knew whether the expenses were incurred concerning bales which has been designated as part of the Pabst sale or other bales and for that reason none of the evidence concerning the entries made in the books because of reports from the Chicago and New York office were material and the Court erred in permitting testimony to be introduced as to deduction drawn from the entries made through such reports (p. 429).

110. The Court erred because it did not require plaintiff to first prove that the entries made in the books were made contemporaneous with the facts to which they related and that they were made by parties having personal knowledge of the fact who corroborated by their testimony that the entries were proper and because many of the entries were made

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from January to the first of June, 1913, at a time when but a very small portion of the Pabst so-called hops remained unsold, for instance, in the month of June, less than 16 bales remained unsold and yet the entire expense of the Chicago and New York offices were declared to be connected with the sale of said 16 bales and the expenses prorated in connection therewith (p. 430).

- 111. The Court erred in permitting witnesses Lange and Horst, who were not familiar with the work actually done and expenses actually made to determine what was the proper portion of prorating of the expenses of the offices in New York and Chicago as between so-called Pabst goods and other goods and the general carrying on of the Horst business (p. 430).
- The Court erred in permitting the testi-112. mony of the witnesses of plaintiffs Lange and Horst referring to the books without requiring the books themselves to be introduced in evidence concerning the sales which plaintiff's witnesses testified to were made by the process of taking a portion of the air-dried hops which were on hand on November 4, 1912, and applying them to contracts which were in existence theretofore, without permitting to defendant to introduce the prices thus obtained for these goods so that the jury might have an opportunity of determining whether a reasonably careful man would have considered these sales as being on the Pabst account as against other sales, selected by plaintiff after the sales took place (pp. 430-1).

114. The Court erred in permitting witnesses Horst and Lange to testify concerning the expenses of the 1300 bales which were claimed to have been sold on the Pabst account, because these witnesses were not shown

to have had any data on which to base a proper prorating of the expenses for the sale of these particular goods with the other goods some of which were of similar character and some of which were of dissimilar character, and because the necessary prorating carried with it conclusions of law as to the manner of application of expenses under the circumstances which existed at various times from November, 1912, to June, 1913 (356) (p. 431).

115. The Court erred in refusing to strike out the testimony of witness Horst with reference to the price for which Pabst's 2000 bales of goods were sold because no portion of the 3062 bales on hand November 4th, were designated as Pabst goods or as being used by him for the purpose of completing the Pabst contract and because after all the goods were sold and 1760 bales being used to fill contracts which were in existence on November 4th, and more than a year after the sale, segregation was made empirically selecting the sales at the lowest price as on Pabst account (p. 432).

116. The Court erred in refusing to strike out the testimony of witness Lange concerning the losses because of bad accounts, because the same were irrelevant and immaterial and based on hearsay evidence. The witness Lange knowing nothing about the conditions under which the sale took place and the manner of attempted collection (p. 432).

118. The Court erred in refusing to strike out the answer to the question asked witness Lange:

Q. What service, if any, did the stenographer perform, with reference to the Pabst goods, if you know of your own knowledge?

The answer being: 'You are segregating an item according to the Pabst goods when all of the services were rendered for all of the goods

that were sold at that time.'

Counsel asked witness Lange:

'Q. Do you know what services he performed if any, with reference to the Pabst

goods at that time?

The COURT. I presume you are asking these questions for the purpose of moving to strike this out on the ground that he is testifying to hearsay.

Mr. Powers. Yes.

The Court. The motion is denied.

Q. Your answer would be the same as far as all of the other items are concerned of the New York office, would it not?' (p. 434).

119. The Court erred in denying motion to strike out testimony given by witness Lange

when he was asked the question:

Q. All of your testimony with reference to these transactions during that period, regarding expenses of these eastern offices, is being given simply as a result of your examination of the books?

A. Entirely.

Mr. Powers, moving as follows: I move to strike out all of this witness' testimony on the ground that it is based on hearsay (p. 434).

120. The Court erred in denying the motion that all of the evidence of witness Lange with reference to overhead charges be stricken out on the ground that it is not shown to be in any way connected with the Pabst Company goods or the goods that Horst set aside for Pabst Brewing Company or designated to fill the order of Pabst Brewing Company and was based on hearsay evidence and was a conclusion of the witness as to the particular amount that should be charged to Pabst goods based upon the matters that lay partly in law and partly in fact and calling for the opinion of the witness, and after witness Lange had

made the admission quoted in the last specifi-

cation (pp. 434-5).

121. The Court erred in allowing the conclusion of the witness as to interest, storage, freight on tare, insurance and local freight because the same were immaterial and incompetent as they were not in any way connected with any hops that were set aside for the Pabst people nor any testimony of any person familiar with the facts as to any of the charges that were entered in the books.

- 122. The Court erred in refusing to allow witness Horst to get data as to rejections of hops made by the Pabst Brewing Company, offered in rebuttal of his testimony that the Pabst people had been in the habit of making rejections (pp. 435-6).
- 123. The Court erred in refusing to strike out the testimony of the witness Horst in reference to the 2000 bales belonging to Pabst on the ground that his only knowledge of sales was by reference to records of sales not made by the witness himself, and with which he had no connection and which were not properly in evidence (p. 436).
- 125. The Court erred in denying defendant's motion to strike out the testimony of witness Lange as to the shipment of goods after they arrived in Chicago and New York, because the testimony was all necessarily hearsay (p. 437).
- 135. The Court erred in permitting the witness Horst to testify by the use of extracts from books in tabulated form, and permitting witness Lange to testify from the contents of the books none of which were produced in evidence and in ruling that the defendant was compelled to verify the facts from cross-examination after they had been given an opportunity of examining the books (p. 440).

- 136. The Court erred in permitting the witness Horst to testify as to the sale of goods which were held by plaintiff for defendant because there was no evidence to show that any specific goods were those held and because also the evidence of sales and all prices obtained from sales of these goods were only known to said Horst by examination of vouchers and statements of third parties about which he had no personal knowledge (p. 440).
- 140. The Court erred in overruling the objection to the question asked witness Lange: 'Beginning on November 4, 1912, until you finished selling the remainder of the bales, about 1300 and some odd bales, were there certain expenses incurred in New York and Chicago and Eastern States in selling the remainder of the 2000 bales of what we call the Pabst hops and other hops?' (p. 441).
- 141. The Court erred in overruling the objection to the question asked witness Lange: 'Did the corporation of E. Clemens Horst Company pay these expenses and these salaries based on these statements?' (p. 441).
- 142. The Court erred in allowing in evidence calculations of witness Lange on interest, storage, freight on tare, insurance, local freight" (Exception No. 58) (p. 442).

### As to Segregation of Two Thousand Bales.

144. The Court erred in sustaining the objection to the question asked witness Horst: Q. What bales of Cosumnes had you then (November 4, 1912) already set aside for contracts then in existence?" (p. 442).

And also in sustaining objection to the following question, viz.:

- "5. What did you do with these 2000 bales of hops that you sold to the Pabst Brewing Company and that they refused to accept? (Exception No. 7) (p. 391).
- 12. Q. Asked witness Horst: What steps, if any, did you take to set aside that 2000 bales for the Pabst people on November 4, 1912, when the defendant notified the plaintiff that they would not take the hops offered? I want to know whether plaintiff segregated any hops at that time for the Pabst people (p. 393).
- 14. Q. Did you have any other hops on hand, save and except these 2900 bales of your own Cosumnes raised hops with which to fill the contract that had been accepted? (p. 394).
- 59. Q. Asked witness Lange: Was there any act done by the Horst Company so as to segregate 2000 of the 3000 bales after November 4th, so that any person other than the Horst people themselves could determine which of the 3000 bales were to be considered as Pabst goods, and sold on the Pabst account? (Exception No. 50)" (p. 412).

### Also question asked witness Conrad:

"58. Q. Asked witness ('onrad: Was there any reason why plaintiff's hops should have sold at less figure than anybody else's that year?"

### Also question asked witness Horst:

"60. Q. Was it necessary to maintain an office in New York with a manager's salary at the sum of \$500 per month in order to sell 16 bales of Cosumnes hops? (Exception No. 51).

- 61. Q. What was the expense of the New York office for salaries while those 16 bales were on hand to be sold on June 1st? (Exception No. 52).
- 62. Q. How many of the Pabst goods were on hand unsold on January 1, 1912?"

## As to Refusal to Allow Testimony as to Market Value of Hops by Experts,

The Court erred in overruling objection to question asked witness Marks:

- "63. What would be the reasonable market value of a hop of the character of samples 1 to 20 if it were choice, in the month of November, 1912?
- 66. Q. What would be the reasonable market value of choice air-dried Cosumnes hops at that time, dried in accordance with the process, whereby drying was made by forcing air from the outside in through the hops?"

### Also to questions asked witness Marks:

- "64. Q. Suppose you cut the price to 161/4 cents how long would it take you to have sold 2000 bales?
- 65. Q. Was the market in a position at that time, if the price of hops was cut down to 16 cents, to have taken 2000 bales, or not?"

### Also question asked witness Sweeney:

"68. Q. Did you actually sell the Pabst Brewing Company some hops of a choice character in November, 1912, for their brewing purposes?" The Court erred in sustaining objection to Pabst Company's question asked witness Horst:

"57. Suppose you cut the quantity of 2000 bales up into ten lots of 200 each, would they have been more salable?"

### As to Errors in Curtailment of Cross-Examination.

"124. The Court erred in the ruling on

a question asked witness Lange:

Q. You say there was a certain 2000 bales of hops on November 4, 1912, in certain warehouses of those bales on November 4, 1912?

A. I can show you some of the records. They are in several books. We did not bring them all here. I started out to do that with Mr. Farrell (p. 360).

Mr. Powers. I move to strike out the

answer as not responsive to the question.

The Court. The answer is responsive to the question. I do not propose to permit you at this time to go into a detailed examination of all of these entries. You may pick out one or two items. I have no disposition to keep anything from you that you have called for in the proper way, but the Court has got to protect itself and the jury against the delay that would ensue from an examination of things of this kind in the courtroom that should have been examined outside.

Mr. Powers. I except the statement of the Court, because my understanding of the law is that when entries in books are referred to, that we have a right to examine those books.

44. Will you give me the deliveries and dates of delivery of Cosumnes goods that you made on your contracts which were in existence at the time of the commencement of the season in 1912?

- 101. The Court erred in refusing to allow the defendant to cross-examine witness Flint in the matter of whether certain hops were considered to be the best average hops of a district.
- 102. The Court erred in refusing to allow the defendant to cross-examine witness Fielder in the matter of the state of the Horst crop as to ripeness at the time they were picked.
- 103. The Court erred in instructing witness Sweeney to confine his testimony to airdried Cosumnes hops.
- 41. I want you to state whether the 4500 bales were stored? (Exception No. 66). The testimony rejected was the means of establishing where all the goods manufactured by the plaintiff and which plaintiff claimed was capable of completing the delivery was stored, and in that way defendant would have been able to show that the plaintiff did not have 2000 bales on hand on November 4th.
- 46. Is it a costly matter to assemble the office force?
- 45. Also give me the price for which you sold the 3062 bales plaintiff had on hand on November 4, 1912, at the time of selling the 2000 bales on account of Pabst.
- 47. Will you give me the amount of the general expenses for the month of July, 1913, and then we can see how they differ from the month of June.
- 48. What allotment has been made to these various contracts when the Pabst contract was breached, according to your theory, November 4, 1912?
- 49. Kindly give us the amount the 1060 bales finally sold for.
- 50. Look up and see whether there was any reduction of prices to the brewers because of a rejection of Cosumnes hops in 1912.

51. What services, if any, did the stenographer perform with reference to the Pabst goods, if you know of your own knowledge?

94. Also the Court erred in refusing to allow witness Lange to tabulate a number of the 1912 air-dried Cosumnes hops from plaintiff's ranch which had been rejected and the history of each of the bales that had been designated as Pabst goods showing where they were stored."

### As to Counterclaim.

The Court erred in instructing the jury that there was not sufficient evidence for them to entertain a demand for a counterclaim.

"2d. That portion in the following words,

viz. (p. 387):

As to defendant's counterclaim, I advise you gentlemen of the jury, that there is no sufficient basis in the evidence upon which to rest a verdict for defendant on that demand, because the evidence showed that defendant was compelled to buy certain hops to complete its brewing operations, because it had relied on obtaining the hops under plaintiff's contract of choice character and the actual number of pounds bought and prices paid therefor were in evidence and it was for the jury to decide whether or not they were a proper claim against plaintiff."

As to Refusal to Give Instructions Concerning Modification of Contract from a Quality Contract to a Sample Contract.

The Court erred in refusing to give the following instruction reading as follows:

"3d. It is admitted that on October 12th, 1912, the plaintiff sent to the defendant a night lettergram signed E. Clemens Horst Co., of that date, which has been introduced in evidence; that the defendant replied to it by the telegrams, signed Pabst Brew. Co., dated Oct. 21st. 1912, which has been introduced in evidence; that the plaintiff replied to the last mentioned telegram by the letter of October 24th, 1912, signed E. Clemens Horst Co., which has been introduced in evidence. That on Oct. 18th, 1912 (320), plaintiff wrote to the defendant a letter signed E. Clemens Horst Co., which has been introduced in evidence; that the defendant replied to the last mentioned letter by letter dated Oct. 23d, 1912, signed Pabst Brewing Co., which has been received in evidence and that the defendant replied to the last mentioned letter by letter dated Oct. 29th, 1912, signed E. Clemens Horst Co., E. L. Horst, which has been received in evidence:

I instruct you that any contract which was entered into between the plaintiff and defendant between October 15th, 1912, and October 29th, 1912, was modified by the last mentioned correspondence. So that even if there was prior to October 15th, 1912, any contract between the plaintiff and the defendant by which the plaintiff was to sell and the defendant was to purchase two thousand bales of hops at the price of twenty cents a pound, plus freight at Milwaukee, or F. O. B. Pacific Coast, vet from and after this correspondence of October, 1912, it became the duty of the plaintiff if it would fulfill its contract to sell and deliver to the defendant two thousand bales of hops equal to the four samples of hops which the defendant had theretofore sent to the plaintiff and it also became the duty of the plaintiff, if it would fulfill its contract to furnish to the plaintiff before shipping or delivering to the defendant any of the said two thousand bales of hops to furnish to the defendant samples of the hops which it

proposed to ship, which samples were required to be equal to the said four samples sent by the defendant to the plaintiff and it was the plaintiff's duty to furnish these samples within a reasonable time after October 21st, 1912, and if you find that the plaintiff did furnish to the defendant the samples of the hops numbers 25 to 38 mentioned in the (321) said letter of October 29th, 1912, but that the last mentioned samples were not equal in quality to the four samples sent by the defendant to the plaintiff as aforesaid, or if you find that the plaintiff did not within a reasonable time after October 21st, 1912, furnish to the defendant samples of hops equal in quality to the said four samples sent by the defendant to plaintiff, then and in either of those events your verdict should be for the defendant" (pp. 387-8-9).

As to Allowing Question Concerning Custom
With Reference to Time of Delivering of
Goods.

"132. The Court erred in permitting the testimony as to custom with reference to time of delivery because there was a definite fixed time for delivery made by Horst in one instance and was recognized by him in a draft of a contract submitted by him to defendant."

The Court erred in overruling objection to question asked witness Horst, as follows:

- "2. Is there a practice or usage among hop buyers and hop dealers as to the delivery of hops when no time is specified (Exception No. 2).
- 3. If no time is specified in the contract for the delivery of hops and the hops are to be of a subsequent year's growth, is there

any practice or usage whereby the seller will have to the end of the shipping season, or if not, what time is he to fulfill the contract for the delivery of those hops?

- 8. State what in your opinion, was the reasonable price that you could have realized from the sale of 2,000 bales of air-dried choice Cosumnes hops, if sold in that quantity, in the month of February, 1913, at the nearest market?
- 11. Please state what was the market price that could be obtained in the month of February, 1913, at the nearest market for that class of hops in February, 1913 (Exception No. 11).
- 6. How many pounds does a bale contain?"

The Court erred in overruling objection to question asked witness Horst:

"137. Were you able or not to deliver out of the 4,300 bales you have specified the 2,000 bales of hops for the purpose of filling the contract for Pabst Brewing Company, of the quality which the contract called for? Which was modified by the Court by adding thereto 'of the quality which the contract called for'."

In overruling objection to question asked witness Horst in rebuttal:

"147. Q. In your testimony, I asked you certain questions as to your ability to deliver 2,000 bales of hops equal to the samples 1 to 20. I now ask you if, on November 4th, 1912, you had 2,000 bales of hops on hand equal in quality to samples 21 to 24."

As to Error in Allowing Growers to Testify as to Commercial Value.

The Court erred in overruling plaintiff's objection to following questions:

- "32. Q. Asked Paul E. Peterson: Look at the samples of the hops and state to the jury whether you consider them in your opinion choice hops.
- 33. Q. Asked witness Conrad: What would you say as to the quality of the crop of 1912, the 4300 bales, as to being choice hops or not?
- 36. Asked witness Zepfel: State whether samples 1 to 20 were choice hops.
- 37. To the question asked witness Theodore Eder: What have you to say as to the quality of hops raised by Mr. Horst in the Cosumnes District in 1912, as being choice or otherwise?
- 138. The Court erred in denying the motion to strike out the testimony of witness Peterson, that the samples of hops from the Horst ranch shown him, were choice hops, because it called for the conclusion of the witness, and the witness was not shown to be an expert on the subject and admitted that he did not claim to be such an expert.
- 126. The Court erred in refusing to allow witness Sweeney to testify concerning whether or not Pabst Brewing Company had the reputation of rejecting goods and although Mr. Powers offered to prove that the only goods ever rejected by Pabst were the Horst goods (Exception No. 81)."

As to Testimony of Witnesses Chalmers and Traganza and Concerning Observations as to Manner of Picking Hops by Horst Company.

The Court erred in sustaining defendant's objections to the following questions asked witness Chalmers:

"72. What was said to you by the man in charge with reference to the manner of bailing the hops so far as the leaves and twigs were concerned?

73. Q. Asked witness Chalmers: While you were at the Horst hop house and seeing the picker at work in the manner in which you state, did the man in charge say anything to you about the manner in which he was picking hops so far as the leaves and stems were concerned?

74. To the question asked witness Chalmers: Was anything said by the man concerning instructions, because of certain goods that were to be used to fill an eastern order?

76. Asked witness Chalmers: What, if anything, was said by the man in charge of the picking machine concerning instructions with reference to hops that were going into the picking machine?

78. The Court erred in sustaining objections to all questions asked witness Chalmers covering the operations of plaintiff's picking

machine.

79. The Court erred in striking out all of the testimony of witnesses Chalmers and Traganza during the argument of the trial of the case. The character of this testimony is set forth in the last six specifications herein.

85. Also to question asked witness Traganza: Did the man in charge of the picker, state what his instructions were with refer-

ence to handling the leaves and stems?

104. The Court erred in making an order striking out the testimony of witness Chalm-

ers to the question:

Q. What did you observe about the picking machine on the Horst ranch? and in saying, 'You will find that he does not know anything about whether they went into these hops or not'.

105. The Court erred in refusing to allow witness Traganza to testify to what he saw concerning the hop picking plant in operation at plaintiff's plant, in August, 1912.

- 128. The Court erred in refusing to allow the testimony of witness Chalmers concerning the leaves and stems going into the hops which were being dried because the testimony showed that all of the hops thus being dried were plaintiff's air-dried Cosumnes hops, that all of the bales were being handled in the same way and witness Horst had testified that with the exception of a small number of bales which were separately clean, that the remaining bales were all baled in the same way, and sold in the same way and consequently any way which showed the manner the leaves and stems entered into the bales was material evidence for the Court to know.
- 130. The Court erred in refusing to allow the evidence offered by witness Chalmers with reference to the state of the hops picked by plaintiff in August, 1912, concerning greenness and unripeness, because the testimony of the witness was that the hops in the samples 1 to 20 were unripened and this evidence tended to corroborate the evidence of the other witnesses and to contradict the statement of plaintiff's witnesses, that the hops were picked properly and were proper in color and were choice.
- 131. The Court erred in striking out the testimony of witness Chalmers on the subject

of the stems and the statement of the party in charge of the picking machine and as to greenness of the hops because all thereof was material as corroborative of the expert testimony of defendant's witnesses and rebuttal of the testimony of plaintiff's witnesses."

As to Testimony as to Immaturity and Greenness of Hops When Picked.

The Court erred in sustaining objection to question asked witness Chalmers:

"77. Q. Do you know about the relative time that hops usually ripen?

75. Q. At that time you say you were em-

ployed taking care of your crop?"

The Court erred in striking out the testimony of witness Chalmers with reference to the greenness of hops during argument of case by counsel and stating that witness did not know anything about what he was testifying:

"148. The Court erred in interrupting attorney Powers while arguing for the defendant and striking out the testimony of witness Chalmers concerning the greenness of the character of the hops at the time they were picked by the plaintiff."

## Argument of Points.

TESTIMONY AS TO PRICE AND SALABILITY OF COSUMNES HOPS THOUGH NOT AIR-DRIED WAS IMPROPERLY RE-FUSED.

The correspondence and acts of the parties referred to herein show that the final contract between the parties was a sale by samples of 2000 bales of Cosumnes hops equal to type samples 21 to 24, hence all of the evidence with reference to the value of any Cosumnes hops, though not air-dried of the Horst process was admissible because,

First. The parties themselves so construed the contract by contemporaneous action; that is to say, Horst submitted samples 25 to 38 which were not all air-dried hops.

Horst on direct examination (p. 81) said concerning them, "among them there are other hops. They are not all air-dried Cosumnes hops". Lange testified to the same effect.

Second. The type samples 21 to 24 were admittedly not "air-dried".

Consequently the several rulings of the Court, refusing testimony with reference to the Cosumnes hops that were not "air-dried" by the Horst process, were error.

In November, 1912, Horst was taking "whatever he could get as fast as he could get it" for his hops even as low as 14 and 14½ cents (pp. 76 and 77), and the Court refused to allow Pabst Company to prove that he bought Cosumnes hops at the same time for 17 cents.

All witnesses testified that commercially speaking air-dried and kiln-dried were the same; that the same price was paid for both kinds of hops and that no person could tell the difference between hops cured by air-dried process and hops cured by kiln-dried process, after they left the kiln.

And they had the same value.

The price actually paid by Horst for Cosumnes hops even if they were not air-dried was material for three reasons:

First. It showed the price of hops to a dealer in the Sacramento market in November, 1912.

Second. It showed that there was a demand for Cosumnes hops at that figure.

Third. It showed that Horst himself was selling air-dried hops for less than the figure which he paid for other Cosumnes hops, thereby demonstrating that the hops disposed of by him at 14 and 14½ cents for Pabst were either inferior in quality or were not being sold with proper discretion.

The pleadings conclusively show that Pabst Company (p. 29) alleged and Horst Company joined issue on the question (p. 37) as to whether there was a contract for sale by type samples not "air-dried", hence all such evidence was admissible so that the jury could decide the issue thus joined.

PABST COMPANY WAS PREJUDICIALLY AFFECTED BY THE INSTRUCTIONS OF THE COURT TO THE JURY TO THE EFFECT THAT THE ORIGINAL CONTRACT BETWEEN THE PARTIES WAS NOT MODIFIED BY THEIR SUBSEQUENT CORRESPONDENCE AND CONDUCT.

THE JURY SHOULD HAVE BEEN ALLOWED TO PASS UPON THE QUESTION OF MODIFICATION OF CONTRACT.

During the trial of the case, the Court said (pp. 93-4):

"The Court will instruct the jury what is necessary to make a contract and the jury will

determine from the evidence whether the contract was made. The Court will also instruct the jury what will amount to a modification of that contract and the jury will see whether it was modified or not according to the evidence."

In this last ruling the Court correctly stated the law because all questions arising as to whether the contract was changed by the acts of the parties was for the jury to decide under proper instructions.

Anndall v. Union etc. Co., 165 Ind. 110, 74 N. E. 693-94 and cases cited;

Halsey v. Darling, 21 Pac. 913;

Gassett v. Galzier, 43 N. E. (Mass.) 193-195;

McNamara v. Michigan Trust Co., 111 N. W. 1066;

Pacific Export Lumber Co. v. Northern Pacific Lumber Co., 80 Pac. (Oregon) 105;

Galey v. Van Ostrand, 114 N. W. 817;

Etting v. U. S. Bank, 24 U. S. 67;

Pence v. Langdon, 99 U. S. 578-81;

Marreda v. Silsbee, 62 U. S. 146.

Relying upon that ruling Pabst Company tried the case on the theory that the jury was to find whether the contract was modified.

However, the Court subsequently abandoned this ruling. The Court instructed the jury that the contract was not modified as follows:

"This contract was in no respect modified or changed by the subsequent correspondence or negotiations of the parties" (p. 368). This was excepted to by Pabst Company at the trial in accordance with the rules.

As a matter of law when Horst Company on October 29, 1912, sent samples 25 to 38 as an offer of hops equal to type samples 21 to 24 it abandoned prior negotiations and adopted the contract based on type samples.

Industrial Works v. Mitchel, 72 N. 🕱 25; Brown v. Guaranty Co., 128 U. S. 403-415; Northwestern Cordage Co. v. Rich, 67 N. W. 298.

"A contract may be discharged either by the making of an entirely new and independent contract relating to the same object, or merely by the introduction of new terms. In the latter case the new contract consists of the new terms and so much of the original contract as remains unchanged. If, for instance, parties who have contracted for the construction of a building according to specifications, and at a price, to be paid partly in cash and partly in some other way, should afterwards agree upon a change in the specifications and an increase in the cash payments, there would be substituted for the original contract a new contract, consisting of the new terms and the unchanged terms of the original."

Clark on Contracts, Sec. 229, Page 420; Brown v. Everhatd, 52 Wis. 205, 8 N. W. 725;

Teal v. Bilby, 123 U. S. 572-578; Waugenheim v. Graham, 39 Cal. 169; Kingham & Co. v. Watson, 97 Wis. 596; Chesapeake etc. Co. v. Ray, 101 U. S. 522; West v. Platt, 127 Mass. 372;
Holloway v. Frick, 24 Atl. 201 (Penn.);
Beach on Modern Law of Contracts, p. 950,
and cases cited;
Gray v. Foster, 10 Watts (Pa. 280);
1 Beach on Contracts, p. 907, Sec. 771;
Green v. Wells, 2 Cal. 584-585;
Bell v. Staacke, 147 Cal. 186 at 201;
Keith v. Electrical Co., 136 Cal. 178 at 181.

Inasmuch as the second lot of samples were not all choice air-dried Cosumnes hops (Mr. Horst's testimony, p. 91) and the selection by the Pabst Company of any of these samples would have been compliance with the contract as modified and would have been binding on both parties, and having in mind that the original attempted contract was for choice Cosumnes air-dried hops and not a sample contract, the agreement was necessarily modified by the acts of the parties occurring after 1911.

Tested in another way if the Pabst Brewing Company had accepted the second lot of 14 samples as equal to the four samples which by the agreement supplied a new standard under the contract, the Horst Company would not have had a cause of action against the Pabst Company because of its rejection of the first lot of samples, 1 to 20 and the hops then delivered would not have been "air-dried" but Cosumnes of any kind equal to samples either 21 to 24 or 25 to 38.

It is impossible to state whether the verdict of the jury was based upon the proposition that the rejection by the Pabst Company of samples 1 to 20 was a breach of the contract or whether its rejection of samples 25 to 38 as not equal to the four samples was a breach.

Both lots of samples were submitted to the jury upon the same issue while in fact samples 1 to 20 were not in issue because of the modification of the contract and because they were never tendered to Pabst Company as being equal to type samples 21 to 24.

If rejection of samples 1 to 20 was a breach it was waived by the Horst Company in continuing negotiations and reopening the subject matter for further dealings.

Brown v. Guaranty Co., 128 U. S. 403-415.

In the face of the rulings as to air-dried hops during the trial, which are quoted herein elsewhere, it was incumbent upon Pabst Company in making its defense to be prepared upon each issue.

Not knowing in advance what the position of the Court would be in respect to modification, it was incumbent upon Pabst Company to be prepared upon all the issues.

The fact that depositions were taken prior to the trial by Pabst Company which related to both sets of samples did not make that deposition evidence and the same was not evidence until introduced in open Court.

If the Court had ruled during the trial that the contract had been modified, the evidence of samples 1 to 20 would have been immaterial and would not have been used by Pabst Company and the use thereof might have been properly objected to.

In view of the situation we most respectfully urge that the rulings referred to were most prejudicial errors.

## AS TO COUNTERCLAIM.

The ruling of the Court confining the testimony to "air-dried" hops and that the contract was not modified to a "sample contract" destroyed Horst Company's opportunity to establish its counterclaim because this counterclaim was based upon the theory that the contract had been modified to a sample contract and that the goods offered were not up to type samples and that they were compelled thereby to pay over twenty cents for the hops which they were compelled to buy to fill their necessities in the brewery for the year 1912-3.

IT WAS ERROR TO REFUSE THE INSTRUCTION REQUESTED BY PABST COMPANY THAT THE LETTER OF OCTOBER 29th CREATED A "SAMPLE CONTRACT" IN PLACE OF "QUALITY CONTRACT".

After the forwarding of the samples 25 to 38 and the letter of October 29, 1912, by Horst Company, the contract between the parties became that which is set forth in the instructions requested by

Pabst Company (pp. 381-2). The contract then became one of delivery by samples like type 21 to 24.

In other words, from and after the receipt by Pabst Company of samples 25 to 38 and the letter of October 29, 1912, the condition that the hops, should be "air-dried" of the Horst process was eliminated.

The contract on the new terms of deliveries equal to samples like 21 to 24 included necessarily an abandonment of the old contract based or air-dried characteristics.

Chesapeake v. Ray, 101 U. S. 522; Waugenheim v. Graham, 39 Cal. 169; Gibson v. Donnelly, 13 N. Y. Supp. 808; 1 Mecham on Sales, Sec. 803.

## HORST COMPANY WAIVED ITS RIGHT TO ELECT TO USE SALE PRICE OF TWO THOUSAND BALES AS BASIS OF DAMAGES.

When Horst Company received Pabst Company's message refusing to accept the tendered samples 25 to 38 as a delivery equal to type samples 21 to 24 then, if the hops represented by 25 to 38 entitled it to such delivery, Horst Company had a cause of action.

Horst Company then had three remedies open to it:

First. To take 2000 bales of hops, equal to 25 to 38, place them in a warehouse and notify Pabst Company that it had the hops on hand ready to deliver to them and tender them the delivery of them and then sue for the entire contract price of twenty cents a pound.

Second. To set aside the 2000 bales and sell them for the best obtainable price for and on account of Pabst in the nearest available market.

Third. To sue Pabst for the difference between the market value of the hops on the date of the refusal and the contract price.

Horst Company's actions from November 5th on established the fact that they abandoned both the first and second elections as to remedy and at the time of the commencement of the action intended to rely on the third method.

Under date of October 18, 1912, they had written (p. 67):

"We feel that the fair plan that should be most equitable to you will be to agree upon a difference in price to be paid us on the 2000 bales. To arrive at that amount, we should get. if market had not changed, the fair profit as between the simultaneous buying and selling prices, and as market has declined we should get in addition, the decline in the market, but if you think that this is asking too much we are ready, subject to our confirmation within three business days after receipt of our reply. whatever may be the difference between the contract price and any figure you offer us now on 2000 bales 1912 hops equal to the four samples you sent us, or to the selection of the 20 we sent you." \* \* \*

No suggestion made was accepted by Pabst Company after the rejection and no other suggestion was made by Horst Company and nothing was done by the parties with reference to establishing or determining the manner of remedy.

After the so-called breach Horst Company continued to sell their goods in their usual manner without any attention whatsoever to the Pabst Company's transactions. Suit was brought on the theory that there had been a loss of eight cents a pound on 200 bales of hops for each bale of the 2000 bales. In other words \$32,000.

When Horst Company began to prepare testimony for the trial of the case, however, they changed their plan of campaign and attempted to elect as a basis of damages that they had sold 2000 bales for and on account of Pabst Company at a loss. Some of these goods had been theretofore offered to other brewers and rejected and were in New York, Milwaukee and Chicago; some of them had been sent from one warehouse to another.

As illustration, Mr. Lange testified (p. 196):

"There were two lots 523 and 524 in the Sibley warehouse. They were designated as Pabst goods by the Horst people.

Q. When were they made the basis of any

charge against the Pabst account?

A. When we made up our list of sales on the 2000 bales. Just since we have been getting up the statements of the account you have asked for."

In other words after the sales had all been completed Horst Company attempted to elect as their method of proving damages, that they had become the gratuitous bailee for the Pabst Company of 2000 bales of their own "air-dried" Cosumnes hops, and that they had sold these 2000 bales for and on account of the Pabst Company, notwithstanding they had done nothing to establish the identity of these 2000 bales by any act.

At the time of the alleged breach of contract nothing was done by the Horst Company to identify any 2000 bales as Pabst hops.

They continued their business in the same way as they had been conducting their business and delivered portions of the hops that were on hand at that time to various customers upon contracts which were in existence on November 4, 1912, and sold some of the hops to the public through their New York and Chicago offices.

They thereby abandoned all right to estimate their damages on the basis of expenses in selling any 2000 bales.

Had they carmarked any 2000 bales as Pabst goods on November 5, 1912, they would have become gratuitous bailees of them. Had they thereafter intermingled them with their own 1062 bales they would have so acted as to have made themselves purchasers of these 2000 bales.

Their actual conduct practically accomplished this result. Pabst Company was entitled to a credit on that day of the market value of said 2000 bales, which is in evidence to be from 17½ to 19 cents.

Practically all of these so-called Pabst hops were sold prior to February, 1912 (p. 79), and yet an establishment paying \$100 a month rent in New York and \$20 in Chicago, which included a head salesman at \$500 per month in New York and one in Chicago office at \$350 per month, was continued and at the trial of the case the cost of its maintenance was charged partly to Pabst up to July 1, 1913, although there is no entry in Horst Company's books of any such charge and the evidence was allowed over Pabst Company's objections.

Had there been no Pabst contract whatsoever, the New York office and Chicago office would have been compelled to have had these managers and pay said rent and other expenses.

On November 4, 1912, Horst had on hand 10,500 bales of hops of which they claim 3062 were "air-dried" and a large number of contracts with purchasers throughout the world at prices ranging from fourteen to twenty-six cents. Some of these contracts had been filled before November 4th, and some were filled after November 4th. When Mr. Lange, who acted as the bookkeeper's assistant for Horst Company began to make computation to introduce evidence in the trial of this case 494 bales, which had been allotted to these contracts before November 4th were treated as "Pabst hops" and 1062 of the bales which were

allotted to these contracts were treated as Horst hops. The only reason for the classification was a desire to make the so-called Horst damages as large as possible.

COMPILATIONS BY SAN FRANCISCO ASSISTANT MADE FROM REPORTS OF NEW YORK AND CHICAGO OFFICE NOT SWORN TO WERE INADMISSIBLE BECAUSE: 1. BASED ON HEARSAY EVIDENCE; 2. BECAUSE THE BOOKS THEMSELVES WERE NOT INTRODUCED; 3. BECAUSE NO PROOF WAS MADE THAT THEY WERE PROPERLY AND ACCURATELY KEPT—ON THE CONTRARY THE PROOF IS THAT MANY ENTRIES WERE ONLY "APPROXIMATE" AND NOT INTENDED TO BE CORRECT; 4. NO NECESSITY WAS SHOWN FOR DEPARTURE FROM THE USUAL RULES OF EVIDENCE IN THEIR INTRODUCTION.

Witnesses Lange and Horst were the only persons testifying as to the sales price and costs and expenses for sales. Their testimony was based upon written reports made by unknown persons whom the jury never saw and who were never sworn or cross-examined.

The jury never saw the books. The witnesses testified that none of the reports reported any charge against Pabst Company that was entered in the books.

Hence the reports were hearsay to the witnesses. The reports were made by the managers of the Chicago office and the New York office—both of these men could have been produced as witnesses. Had they been produced Pabst Company could have

cross-examined them as to the connection of each item of expense with the Pabst goods, with the other Horst goods, with Horst Company's future business and with the plan to hold business in the future and the like.

All compilations based upon entries thus made were of course vitiated for the same defect.

The witness Lange did not know what prices were obtained except by hearsay.

He did not know which 2000 bales was set apart as having been sold to Pabst, except by drawing conclusions concerning the legal effect of certain acts of Mr. Horst by way of applying sales to the Pabst account over a year after the transactions took place.

This error is also shown by the objection to the question asked witness Lange:

"Have you made an examination of the books for the purpose of ascertaining the price at which they (the 2000 bales sold to Pabst Company) were sold and the persons to whom they were sold?"

Witness had already testified that he knew nothing about the transactions personally; that no particular 2000 bales had been set aside to the Pabst people and consequently the examination necessarily was a compilation of unsworn-to records which to this witness was hearsay, and required the witness to exercise a conclusion of law as to whether or not any particular sale or expense item was

connected with the 2000 bales properly chargeable to Pabst.

Similarly the Court erred in refusing to strike out portion of the answer of witness Lange:

"That the sale to the Pabst people was a coast price and most of the sales made of the 1920 bales of the 2000 bales were sold on delivery prices after November 4, 1912, delivered at a town where the brewery is situated."

This evidence was based upon the unfounded assumption that there was a certain 2000 bales belonging to Pabst Company and that he knew the prices reported were delivery prices or that the said prices were the market prices then prevailing at the place of sale.

The witness testified as if it were his own knowledge concerning deductions as to prices being "Coast prices" or "delivery prices" from so-called vouchers, which were merely unverified written reports of the New York and Chicago managers, about matters concerning which the witness had no personal information and which vouchers were not introduced in evidence.

Similarly the Court erred in overruling the objection to the question:

"What is the aggregate of the miscellaneous charge for these 2000 bales?"

Witness Lange testified that no entries were made in the books as to any 2000 bales but that he had made an examination of certain sales of 3062 bales shown in the books some fifteen or twenty months after the entries were made for the purpose of ascertaining the price at which they were sold and the persons to whom they were sold in order to segregate the items concerning the 2000 bales which he saw fit to consider Pabst goods.

In other words this case was decided on the conclusions of one of Horst Company's employees, employed not as bookkeeper but as special assistant to the manager, which manager testified that he prepared for this lawsuit from the time he commenced to pick these hops and this assistant was in no way connected with the transactions.

The conclusions of this assistant were not made at the time of the occurrence of the transaction but a short time prior to the trial of the case from data gained by going through books and compiling prices and expenses which he selected to be sales by Horst Company for and on behalf of Pabst Company without said assistant having any personal knowledge of the transactions as they occurred and using data about which Pabst Company never had any opportunity to cross-examine any person familiar with the facts to ascertain whether the transactions actually occurred, or the circumstances surrounding the several transactions.

It must be remembered that Horst Company does not claim that the men who actually made these miscellaneous charges attempted to connect any of these expenses with any particular sales or any particular part of the so-called Pabst 2000 bales.

So with reference to the testimony as to bad debts and uncollected accounts, the witness testified that no portion of the Cosumnes goods were set aside as and for Pabst but that after the goods had been sold that so much of the Cosumnes air-dried goods as were sold and found to be bad accounts were shortly before the trial of the case charged to Pabst.

That is certainly conclusions of law based on hearsay and certainly importing into the contract an insurance of accounts that is no way connected with the contract in question and permitting the witness to draw conclusions of law from facts not in evidence.

It was not proper testimony.

When counsel for Horst Company attempted to cross-examine the witness as to the books, the Court by a series of errors refused to allow an examination in detail sufficient to establish the facts of the transactions.

Pabst Company were never permitted at any one time to have the books before them in Court so that there could be any cross-examination even as to the records made by the New York and Chicago offices which had been tabulated not by a bookkeeper but by the special assistant to Mr. Horst. Without the books cross-examination of the compiled statements was impossible.

We respectfully submit that all of the testimony with reference to the so-called entries in the so-called books were introduced in flagrant disregard of the fundamental principles of requiring primary evidence when it is possible to be had.

Horst Company's attempt to take advantage of the new theories as to the necessity of business where a great number of entries are made by a great number of clerks in different places far from the place of trial requiring the Courts to be lenient in following the old rules as to hearsay evidence has demonstrated the extreme danger of the tendency of said theories.

The books were not offered at all. The extracts from them were not offered in such a way as to carry with the offer any safeguard of the entries having been made in the ordinary course of business.

On the contrary there was every indication that they were self-serving declarations specifically compiled for use as testimony in this case.

THE REASON FOR THE REFUSAL OF HORST WITNESSES TO PRODUCE THE BOOKS MUST HAVE BEEN THAT THEY DID NOT HAVE TWO THOUSAND BALES OF AIR-DRIED HOPS ON HAND NOVEMBER 4, 1912.

The record shows that postponement after postponement was taken so that Pabst attorneys could cross-examine as to entries in the books the two Horst experts who had prepared the Horst case since the time of picking. This was necessary because the Court had refused to require the books to be brought to Court and because no bookkeeper or any person connected with the transactions had testified and Pabst's counsel were attempting to find when the 494 bales allotted to Pabst were actually delivered to the customers and they were unable to ascertain anything except as to the 20 bales that were given to Hohenadel, although they were promised time after time that the records would be given from the books.

The reason for the said witnesses so evading giving the evidence was that as a matter of fact on November 4, 1912, Horst Company did not have 2000 bales of air-dried Cosumnes hops to deliver to Pabst anywhere either in California or anywhere else and they were presenting this fact being shown.

They only had 1336 bales choice air-dried hops on November 4, 1912, as has been shown by the actual entries in the sales book for withdrawal (p. 365), and using the testimony of the man who picked the hops as a basis for the number of hops actually picked.

This is also shown by the fact that Lange used 1346 bales as the basis for prorating overhead expense.

If there had been any more than 1346 bales on hand he would have used the larger amount.

In order to cover up this discrepancy Horst testified that he applied the balance of the Pabst goods to sales contracts already in existence.

To prevent the Court discovering the fact that he had used the said allotment for the said purpose of covering up the deficiency he evaded crossexamination as to the time the goods were delivered on the said 494 bales.

It will also be observed that even using the 494 bales thus allotted and the 1346 bales used by Lange in figuring the overhead there was only 1840 bales, or a discrepancy of 160 bales of Pabst's 2000 accounted for for Pabst until Horst finally made the figure 1503 bales in his testimony but not from the books.

This desire to cover up the transactions was also the reason why witnesses volunteered that the entries of stock movements were only "approximate dates" (p. 234), and that the goods were oftentimes on hand when in fact the books showed by entries that they had already been shipped (pp. 234-235).

Again the reason why Horst refused to testify as to the sales of the 1062 bales allotted to contracts in existence, but not charged to Pabst was that the prices were in excess of twenty cents. If he had been able to have allotted any of these 1062 bales of contracts less than twenty cents he would have filled up the discrepancy of the 160 bales by making an allotment of 654 bales instead of 494 bales to Pabst Company.

EVERY REASON FOR STRICTLY ADHERING TO THE EXACT RULES OF REQUIRING PRIMARY EVIDENCE WERE PRESENT.

1st. Mr. Horst testified (p. 135):

"I prepared for the lawsuit before we picked the crop. I have had considerable experience in litigation. I always prepare for lawsuits immediately on their appearing in sight. Whenever the market drops."

The managers of the Chicago and New York offices could have testified definitely and accurately as to the prices obtained at each sale and the connection of all expenses to the goods sold at each sale, but had they testified, Pabst Company would have had an opportunity to cross-examine them as to many matters including which of the goods had been rejected by other buyers—why certain of the accounts had not been paid, why expenses amounting to nearly \$1000 were expended in June, 1913, when but 8 bales were sold and the usual facts connected with such transactions. This cross-examination Horst Company wished to avoid, hence Horst, the manager who prepared for this lawsuit before the crop was picked took good care not to take the depositions of any witnesses who could give any facts showing the actual transactions or the commercial character of the hops after they were cured.

3rd No books of original entry were kept in New York or Chicago.

4th. No bookkeeper keeping any books in San Francisco testified.

Mr. Lange who testified concerning his deductions from memoranda received from others testified (p. 142):

"I handle the general office work and special work for Mr. Horst."

5th. Lange, himself, did not make these computations until after he began to prepare for the case as handler of "special work for Mr. Horst"; he testified (p. 196) referring to bales 523 and 524:

"Q. When were they made the basis of any

charge against the Pabst account?

A. When we made up our list of sales of the 2000 bales. Just since we have been getting up the statements of the account you have asked for."

6th. There were no entries made in any book at any time as to any charges to Pabst Company.

7th. The parties who offered the deductions from data made by others in Chicago and New York in lieu of primary testimony were specially careful to handle the entries in the books in such a way as to prevent effectual cross-examination.

One was Mr. Horst himself who had been preparing for this lawsuit since the hops were picked; and the other was Mr. Lange, the man who was designated to do his special work and who on cross-examination testified that 497 of the bales allotted to Pabst Company after November 4, 1912, were on prior contracts (p. 155).

Mr. Horst testified (p. 236) that the contracts filled for Pabst Company were those that had the lowest sales price on the contract.

And Mr. Lange testified that out of the 497 bales thus segregated, 20 of them had been already sold to Hohenadel.

In other words 20 bales claimed to have been sold to Pabst had been sold to Hohenadel and the record shows they were sold on August 23, 1912 (p. 267), over two months before the Pabst alleged rejection. Again Mr. Lange testified there were 1346 air-dried on hand charged to Pabst on November 4, 1912. Mr. Horst testified 1503 were on hand and so charged and the books show that only 4100 less 2764 or 1336 bales in all then remained unsold. These are but samples of the attempted deductions from said books. This shows the absolutely, hopelessly impossible self-serving character of this method of proving entries from books without the books being offered.

It necessarily violates every principle of law concerning the right of defendant to cross-examine.

It gives the proponent of a proposition a means to so prove his case that the defendant has no opportunity to ascertain the facts because the witness testifying could always shield himself from cross-examination on any testimony damaging to his case by honestly testifying that he did not know about the transactions. In an almost identical case, the California Appellate Court said:

"We are referred to no authority and we know of none holding that a party to an action may copy a book of original entry in his possession, withhold the original and prove his case by introducing such copy in evidence, while on the contrary numerous authorities hold such ruling to be error."

Campbell v. Rice, 22 Cal. App. 734-736.

In that case the bookkeeper testifying actually had charge of and copied the accounts between the parties and he testified that a bill of particulars prepared by him was a true and correct copy of a statement of account between the parties showing the amount due from defendant to plaintiff for labor and materials used in the work. He further testified that he copied it from his original order slips which were entered from the time books and pay rolls; that he did not have a book showing original entries but had original order sheets from which he made the statement after suit was commenced.

Plaintiff tendered the document in evidence, and the objection was made there as here; the Court refused the testimony, saying:

"In the United States a tradesman's book of original entries is in most jurisdictions received in evidence as prima facie proof, when supported by the tradesman's oath (1 Wharton on Evidence, Sec. 678); and this rule, though not expressly declared, has the sanction of numerous authorities in this state (White v.

Whitney, 82 Cal. 163 (22 Pac. 1138); Landis v. Turner, 14 Cal. 573). The rule, contrary to the common law, had its origin in the necessity of cases arising where such books were the only evidence of the matter in controversy and were therefore the best evidence obtainable. Not only was this copy of the bill of particulars not the best evidence, but no necessity existed for its introduction, for it conclusively appears that the document was transcribed from order sheets, pay rolls and other data constituting a book of original entry (Hooper v. Taylor, 39 Me. 224; Rowland v. Burton, 2 Har. (Del.) 288; Kendall v. Field, 14 Me. 30 (30 Am. Dec. 728); Taylor v. Tucker, 1 (fa. 231) in the possession of plaintiff and which he might have produced, thus giving defendant and the Court an opportunity to examine it, in order to determine its integrity and correctness and giving to plaintiff an opportunity to explain any errors or discrepancies therein affecting its weight as evidence."

## ADMISSION OF THE TESTIMONY AS TO WHAT THE BOOKS SHOW FROM COMPILATIONS WITHOUT THE BOOKS BEING INTRODUCED WAS PREJUDICIAL ERROR BECAUSE

- (a) The Testimony Was Hearsay; the Books From Which Facts
  Were Taken Were Not Introduced In Evidence;
- (b) If the Books Had Been Introduced In Evidence They Could Not Have Been Admissible Because Not Properly Authenticated.

In an almost identical case the Supreme Court of California has held that certificates of an assayer to a mine as to the value of its ore was properly rejected when the assayer was not produced and no evidence of the correctness of the certificates was furnished. The Court said:

"The certificates were not of an official character, but were mere private statements and in legal contemplation were of no higher value than other hearsay testimony."

People v. Whalen, 154 Cal. 472-477.

None of the sales in the New York office or the expense therein created other than the fixing of salaries of the principal employees was under the supervision of either Horst or Lange.

And under an almost identical state of facts the Court in the case last quoted, said:

"The same considerations apply to the refusal of the Court to allow the witness Thomas Price to testify to the assays afterwards made by him in his assaying establishment, but not made by him or under his supervision and not under such circumstances that he had any personal knowledge whether they were correct or not."

People v. Whalen, 154 Cal. 472-477.

It is customary where books contain many items to permit an expert or one familiar with them to draw particular account from the books and submit same in tabulated form, which is usually done by stipulation; it may be done by direction of the Court but the books must be introduced and proved and the items comprising the calculation must be proved in accordance with the rules of law, otherwise the said tabulated statement is clearly hear-say.

- (c) The Compilations Introduced In Evidence Were Self-serving Entries.
- (d) The Evidence From the Books as to Overhead Charges Was Double Hearsay.

The testimony of the witness that the entries from which he took the items particularly as to overhead charges was made up from statements and vouchers of agents is double hearsay as stated, first, because the books were not in evidence and, second, because of the unverified nature of the reports from which the entries themselves were made; third, because of the unverified connection of the expenses with the Pabst goods.

In Callihan v. Washington Power Co., 56 L. R. A. 772 the Court said as follows:

"Independent of his own statement, there was no evidence that the letter was written when the transaction was recent, or that it had ever been in the hands of the plaintiffs. It may have been prepared with direct reference to this litigation. The case is not so strong as it would have been on proof by a third person that the witness had made similar declarations immediately after the business was transacted. So that, of course, if the testimony might have been prepared with direct reference to the litigation, it would fall under the objection of being self-serving testimony, and was properly overruled."

In the case of Watrous v. Cunningham, 11 Pac. 811-812, the Supreme Court of California says:

"It does not sufficiently appear from the record that the account-book of the plaintiff offered in evidence was a book of original en-

tries, in which the party offering it kept his accounts in the regular course of his business, or that the entries therein were made by him at the times they purport to have been so made, and contemporaneous with the transactions which they chronicled; nor did it appear that no other books of account were kept by him, and that he had no clerk or bookkeeper, or that he kept fair and honest accounts. Neither does it appear that the plaintiff was present, and made any entry in that accountbook, at the time the alleged sale of the hogs took place, the title to which is in dispute. Therefore the account-book was properly held not to be admissible in evidence, as the necessary preliminary foundation for such admission, either as a book of original entries or as a part of the res gestae, had not been laid."

In the case of Kerns v. McKean, 65 Cal. 411, 18 Pac. 122, 123, the Supreme Court of California said respecting certain books of account:

"But the evidence here offered was inadmissible under any rule. Patterson had a clerk. The entries were made by Hanna, Patterson's bookkeeper. And although, as shown by the statement on motion for new trial, Hanna was examined as a witness, it does not appear that he was questioned with respect to the entries; that he testified that they were made at the date of the transactions they purport to record, or that the entries he made were correct of his knowledge when he made them. Nor was it shown that the book was a book of original entries."

This was affirmed in the case of Kerns v. Mc-Kean, 19 Pac. 817.

"Many laborers are employed, the accounts must, in most cases, of necessity, be kept by a

person not cognizant of the facts, and from reports made by others. The person in charge of the laborers knows the fact, but he may not have the skill, or for other reasons it may be inconvenient that he should keep the account."

In the case of Matko v. Daley, 85 Pac. 721, the Supreme Court of Arizona said:

"The paymaster of the Copper Queen Company testified, in substance that the records were the records of the company; that it was the custom of the company for the men to sign the pay rolls before they could get their money, and that it was necessary for them to do so; that these pay rolls were the pay rolls for December; that they were signed by men who had worked for that month; that he was not present when they were signed; that he could not testify that the signatures were the signatures of Brain or Seffer; only that the signatures purported to be their signatures; that the writing in the body of the pay rolls was in the handwriting of the former paymaster of the company; that precautions were always taken by the company to see that the person who signed the payroll was the person to whom the money was due. We do not think that sufficient proof that the signatures were in fact the signatures of these men was offered to warrant the receipt of these documents in evidence. Furthermore, the evidence at best was but hearsay and inadmissible."

In the case of Price v. Standard Life & Accident Ins. Co., 95 N. W. 1118, the Supreme Court of Minnesota said:

"2. At the trial an objection was made and overruled to the introduction in evidence by

the defendant of the register of patients kept at the Northwestern Hospital, with the entries therein relating to the insured. These entries were made by the superintendent in charge, who was a female physician, in the usual course of business at the hospital, and showed when the patient entered, when he departed therefrom, and the nature of the disease from which he was said to be suffering. This superintendent produced the register, and testified that the entries concerning the insured were made after Dr. Kimball, the physician in charge had observed the case long enough and knew sufficiently about the patient to state the kind of disease, and were wholly based upon information received by her from the doctor. The witness had no personal knowledge of the patient, and had no recollection of the case, apart from the record. Therefore the entries amounted to nothing more or less than what the superintendent wrote in the register what the attending physician told or reported to her concerning Price's illness. To permit these entries to be introduced in evidence was to disregard in a very noticeable manner the rule forbidding the introduction of hearsay evidence, as well as the spirit of the statute which prohibits the examination of a physician as to certain matters without the consent of his patient (Gen. St. 1894, Sec. 5662), although this last objection does not appear to have been made at the trial. \* \* \* But the entries did not even rise to the dignity of a repetition of what the doctor said to a third party, for the superintendent remembered nothing except that she made entries. This testimony should have been excluded."

In re F. Dohmen Company v. Niagara Fire Insurance Co., 96 Wis. 38, it is said:

"The most that can be said is that he had a general familiarity with the business as it was transacted. There is nothing to show that an inspection of the books refreshed his memory and recalled previous actual knowledge of such transactions, or that he at any time knew that the books were correct; vet his general knowledge was such as to satisfy one, ordinarily, of such correctness. There a person is engaged in and has general knowledge of an extensive business; has personal charge of it much of the time; has a regular system by which all the transactions go to the bookkeeper to be there recorded; and is in the habit from time to time, of referring to such books while many of the matters of which he has personal knowledge are fresh in his mind, or when, though such matters are forgotten an examination of the books brings back the previous knowledge of the facts; and where such books by such use, are found to be uniformly correct, and are further shown to be corrected by their daily use in settlements with customers, on proof of such facts, together with evidence by the bookkeeper that all transactions were correctly recorded by him as they were reported for that purpose from day to day in due course of business, such person may testify, by their aid, to the transactions recorded in such books as facts.

Here there was no proper foundation for the use of the books. They were merely produced as the books of account kept in the business, and without any verification whatever, the witnesses were allowed to testify respecting their contents. There is no rule with which we are familiar that warranted the admission of

the evidence under the circumstances. It was prejudicial error, for which the judgment must be reversed."

In Chicago Lumber Co. v. Hewitt et al., 64 Fed. 314, 316, Lurton, Justice, said (but in this case the books were not introduced):

"The ruling under which the book kept by the witness McFadden was admitted as evidence seems to have been rested upon the ground that the evidence of the facts sought to be proven which it was in the power of the plaintiffs to produce. It is true that the book is one which had been kept by the witness, and the entries offered had been all made by him. But it is equally true that the data upon which these entries had been made had been obtained from another, and that the witness had no such personal knowledge as to the correctness of these data as to enable him to say anything more than that he had correctly recorded the results obtained from data furnished by another. Mc-Fadden's book was not even a copy of the temporary memoranda made by Foley. data constituted a detailed statement as to the number, length and lumber contents of each log placed in the river during the day; while the book entry showed only the aggregate lumber contents of the logs, ascertained by adding together the separate contents of each log as noted on the tally board. The mere facts that a temporary entry is made on a slate, or by chalk scores, or in this case, by pencil memoranda on tally boards, for the purpose of convenience and aiding the memory until a book entry could be made at the close of the day, would not operate to deprive such subsequent entry of the character of an original entry, nor the book in which it was made of its character as an original book of accounts.

Whitney v. Sawyer, 11 Gray 242; Faxon v. Hollis, 13 Mass. 427; Smith v. Sanford, 12 Pick. 139. The original memoranda are not books of original entry, and need not be produced; and the fact that such memoranda had been made to aid the memory until a formal entry could be made will not make the book into which they were at once transcribed secondary evidence.

Whart. Ev., Sec. 632. The difficulty in this case lies in the fact that the books entries were made from the tally board memoranda by a person other than the one who made the tally board entries, and who knew nothing of the correctness of the data transcribed.

- \* \* \* Now, if Mr. McFadden had made these entries from his own personal knowledge, the book might have been competent evidence for the plaintiff, upon evidence of that fact and of the further fact that he was 'dead or insane' or beyond the reach of the process or commission of the Court'. In this case McFadden knew nothing of the correctness of the facts which he recorded.
- \* \* \* Their negligence should not operate to place their adversaries under all the disadvantages consequent upon being subjected to the effect of hearsay evidence."

See:

Feuchtwanger v. Manitowoo Malting Co., 187 Fed. 173;

Bates v. Preble, 151 U. S. 149;

Callihan v. Washington Water Power Co., 56 L. R. A. 772; 27 Wash. 154; 67 Pac. 697;

Watrous v. Cunningham, 71 Cal. 32;

Landis v. Turner, 14 Cal. 573-576;

Countryman v. Bunker, 101 Mich. 218; 59 N. W. 422;

Kerns v. McKean, 65 Cal. 411;

Mayor & City v. Second Avenue R. Co., 7 N. E. 905;

Matko v. Daiy, 85 Pac. 721;

Halloway v. White-Dunham Shoe Co., 151 Fed. 217;

Chicago Co. v. Hewitt, 64 Fed. 314-316;

Ford v. Cunningham, 87 Cal. 210;

White v. Whitney, 82 Cal. 166;

Carroll v. Storck, 57 Cal. 366;

Tully v. Stevens, 50 Pac. 595;

Trabor v. Hicks, 32 S. W. 1145-47;

Glenn v. Liggett, 47 Fed. 472-475-479;

Lumyv. Howells, 74 Pac. 432;

Bailey v. Kreutzman, 141 Cal. 519;

16 Cyc. 1214 and cases cited;

Chaffee v. U. S., 85 U. S. 516.

We respectfully submit that the refusal of the Court to permit a detailed examination as to each item was virtually denying to Pabst Company the right to have in cross-examination what should have been required of Horst Company on direct examination.

The entries so far as they were connected with Pabst 2000 bales were not made in the books by anyone and the data used to draw inferences on which the alleged connection with the Pabst 2000 bales was not made by the parties testifying con-

cerning them and the conclusions drawn therefrom were not made at or near the time of the transaction and were not compilations from books which were in evidence.

THE RULING OF THE COURT CANNOT BE UPHELD BY THE RULE THAT WHERE BOOKS ARE IN EVIDENCE THAT COMPILATIONS CAN BE MADE THEREFROM BY ANYBODY WHO IS A COMPETENT ACCOUNTANT.

In all such cases some witness familiar with the facts had testified that the books were correct entries of the facts made within a reasonable time after the facts occurred.

No such testimony is here introduced.

The managers of the Chicago office and the New York office were available for Horst Company but not produced.

The bookkeeper was not produced, but a very clever witness, calling himself special assistant, acted as bookkeeper's assistant, and testified to the application of expenses to Pabst Company's goods which only existed theoretically as Pabst goods.

We respectfully submit that the entire case was dependent upon the proof of the various items claimed by Horst Company to be basis of damage to show the extent to which the Horst Company suffered by reason of Pabst Company's alleged default and that, in view of the fact that some of the items had already been proven to be incompetent and immaterial, for instance the expense item

of \$13.50 for the stenographer's Christmas present, \$500 a month salary in June when but 16 bales of Pabst hops were unsold, and the like, and the testimony of the witness that he did not know what various trips like the trip to Montreal where no Pabst goods were sold was for, warranted a most liberal cross-examination and that justice could not be had without it.

Pabst Company's attorneys made an effort upon cross-examination to get at the exact facts from the books, but from the extracts of testimony herein quoted, it will be apparent to the Court that it was a practical impossibility.

It was not incumbent upon Pabst Company to make Horst Company's incompetent evidence competent but was Horst Company's duty in the first instance to bear the burden of proving by competent and material evidence the damage he claims to have sustained.

Horst's bookkeeping assistant admitted that the entries could not be checked by another expert.

The method of trying the case not only denied Pabst Company the right to cross-examine the witnesses who were familiar with the facts—but also even denied them an opportunity to examine the books containing the tabulations made therefrom by the special assistant as shown by the following testimony of Mr. Lange:

"Mr. Powers. Would it be possible for Mr. Farrell to take this book and check them over? A. No, sir, it would not.

Q. Now about with regard to the 404 bales in New York?

A. The same thing holds good as to New

York.

Q. So you do not know at the present time how many bales were in New York on November 4, 1912?

A. Yes, I do.

Q. Show me how you know.

A. I could not show you from this book.

I have not all of the records here.

Mr. Powers. I move to strike out the testimony with reference to Chicago and New York goods unless some entry is shown where they are contained in the books.

The COURT. That is not the proper way to

reach it. I will deny

official, as in records kept by municipal officers or by private associations, the reports of public boards, bodies, or officials; or of officers of private corporations; or mercantile, as an account of sales, or a receipt, or books of account; or the more fugitive form of letters, memoranda, or telegrams. In other words the rule of exclusion applies generally to all forms of written hearsay."

In the case of Chaffee v. United States, 85 U. S. 516, the Supreme Court said:

"The collector at Dayton testified as to the sources of information from which he made up the certificates and it was admitted that the collectors at the other points would testify substantially to the same effect as to the sources of the information on which they acted. These were generally the freight bills presented by captains of boats, as required by the act of 1840; but sometimes the bills were not presented, and then the simple statements of the captains were received, if they were well

known. The collectors had no personal knowledge of the truth of the statements contained in the certificates. \* \* \* When the books were offered, objection was taken to their introduction, on the general ground that they were hearsay evidence and transactions between third parties. Subsequently a similar objection was taken to each of the certificates on a motion to exclude them from the jury.

The books were not public records; they stood on the same footing with the books of the trader or merchants. The fact that the lease was from the State did not change that character of the entries made by the collectors, who were simply agents of the lessees, and not public officers of the State. Their admissibility must, therefore, be determined by the rule which governs the admissibility of entries made by private parties in the ordinary course of their business.

And that rule, with some exceptions not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, or insane, or beyond the reach of the process or commission of the Court. The testimony of living witnesses personally cognizant of the facts of which they speak given under the sanction of an oath in open Court, where they may be subjected to cross-examination, affords the greatest security for truth."

### THE OVERHEAD WAS IMPROPERLY APPORTIONED.

To allow the testimony of Lange that he apportioned the entire expenses of the Chicago and New York offices from November 4, 1912, to July 1, 1913,

on the basis of 1346 bales to Pabst and 2536 bales to Horst, merely because Horst had 1346 bales of Cosumnes hops on hand in warehouses in Milwaukee, Chicago and New York, to sell at that time, was error, because,

1st. It permitted the witness to determine the question of law as to what was a proper basis of apportioning the expenses.

2nd. The witness did not know the connection the several expenditures had to the bales to which he apportioned the cost.

3rd. The connection of these expenses with the finishing up of business on hand on November—with business anticipated after July and with general obligations of Horst Company was not in evidence and not considered.

4th. On November 4th, the San Francisco office had on hand 10,500 bales (p. 235), including these 3882 bales and it was for the jury to determine whether the Chicago and New York overhead was used partly for sale of remaining 6618 bales. Moreover the proper apportionment was a mixed question of law and fact which should have been left for decision to the jury under proper instructions.

Horst and Lange testified that the list of sales was compiled from a series of reports which had been sent to him from the Chicago and New York offices.

Moreover, the testimony is that 2764 bales had been sold up to November 4th, 1912 (p. 365), and the principal part of the balance were sold in November, December and January, and practically all were sold by the end of February. It was unfair to apportion any of the expenses during March, April, May and June to Pabst Company.

Of the Pabst hops only 36 bales remained in hand May 1st, in other words, 7200 pounds remained on hand May 1st. If these were only worth twelve cents (as testified to by Horst) they were worth \$864.00.

It was for the jury to decide whether the expenses of the two offices, one in New York and one in Chicago was a reasonable overhead expense during the said month of May to sell only 16 bales of hops. Surely salaries of \$500, \$350 and \$175 a month and rent of a New York office in the sum of \$100 would not ordinarily be considered a reasonable expense for selling \$864.00 worth of goods and would not be an evidence that the bailee was incurring these expenses as an ordinarily careful man would in selling such goods.

There were only 16 bales unsold on June 1, 1913.

Again all these entries as charges against Pabst were self-serving declarations and were made after Horst had determined that it was necessary for him to prepare for this law suit.

As the entries so far as they were connected with the Pabst 2000 bales were not made in the books by the parties testifying concerning them at or near the time of the transactions by the witness making the computation, they were hearsay and inadmissible.

THE REFUSAL TO ALLOW THE PRICES PAID FOR THE 1062
BALES OUT OF THE 3062 BALES ON HAND ON NOVEMBER
4, 1912, WHICH WERE USED TO FILL CONTRACTS MADE
PRIOR TO NOVEMBER 4, 1912, WAS ERROR.

It was for the jury to decide what was the price obtained for the so-called 2000 bales of Pabst hops.

The Horst Company did not set aside any 2000 bales.

There were two facts to be decided before the correct sale price of any 2000 bales chargeable to Pabst could be determined, viz.:

First, whether the 3062 bales were of quality like samples 21 to 24, and

Second, if they were the proper 2000 bales to be applied to this contract.

To permit the Horst Company to arbitrarily take those particular 2000 bales out of the 3062 bales on hand which subsequently sold for the lowest price and apportion all charges to them removed the right of the jury to determine this. Moreover the sales book proved conclusively that Horst did not have on hand 2000 bales of these Cosumnes hops on November 4, 1912.

The uncontradicted evidence is that the sales book showed that 2764 bales of Cosumnes hops had been sold by Horst prior to November 4th. The total number baled including clean ups was 4150 bales or 4000 bales without clean ups. Hence there were only 1236 bales available for delivery to Pabst on November 4th, and it should have been left to the jury to decide whether any of these were included in the 2000 bales chargeable to Pabst and how many thereof was proper to be used in computing overhead to be charged to Pabst during the sale months and at what price.

Again the testimony shows that there were but 36 bales "Pabst" hops on hand May 1st, and 12 bales "Pabst" hops on hand June 1st, and the jury should have had the right to decide whether or not these bales could not have been used in filling the orders instead of the 1062 bales actually used.

# AS TO CHARGING BAD ACCOUNTS TO THE OVERHEAD EXPENSE.

If Horst Company's theory be correct the 2000 bales which Pabst should have taken on November 4, 1912, were held by them as bailees for the Pabst people. Their theory was that they were acting under Section 3094 of the Civil Code:

"That one who sells personal property has a special lien thereon dependent upon possession for its price if it is in his possession when the price becomes payable and may enforce his lien in like manner as if the property was pledged to him for the price."

We respectfully submit that no pledgee has the right to require the purchaser of the goods to insure him against his own mistakes in selling property for a credit instead of for cash.

Moreover there was a market at Sacramento and the goods should have been sold at Sacramento.

#### AS TO THE MARKET BEING SACRAMENTO.

The proper place for Horst Company to have sold the 2000 bales was at Sacramento. He testified that there was no market in Sacramento but all of the other experts testified that there was a market at Sacramento. One man Koch testified that he was seeking to purchase one thousand bales of Cosumnes hops from 17 to 17½ cents a pound in November, 1912. Another man, Sweeney, said he actually paid 18¾ cents a pound for 1500 bales of Cosumnes hops in November, 1912. Another man, Drescher, said that he was selling Cosumnes hops in November, 1912, from 17 to 19 cents and that the market would take 2000 bales in six weeks, and at 16 cents would take them inside of a week.

In an almost identical case the Court of Appeals of the Second District of California held that where there was no evidence as to a market nearest to the place where the oranges were sold nor of the market where they were sold that a finding as to the effect of the resale was not sustained by the evidence, the Court said:

"It is further found that this is the best price which plaintiff could have obtained therefor in the market nearest to the place at which it should have been accepted by the defendant, and at such time after the refusal of the defendant to perform said contract as would have sufficed with reasonable diligence for the plaintiff to effect a resale. But from the evidence it appears, without substantial contradiction. that the market price of oranges at Porterville during the periods referred to was much higher, and there was no evidence as to the value of the fruit in any other market; nor was there any evidence or finding as to the market nearest Porterville, or as to where, or when the oranges were sold. It is clear, therefore, that this portion of the finding, is not sustained by the evidence and that it must be disregarded."

Willson v. Gregory, 84 Pac. Rep. 356-357; Tustin Fruit Assn. v. Earl Fruit Co., 53 Pac. Rep. 697.

Moreover the value of the hops in question was the value in November, 1912, in the Sacramento market.

Tustin Fruit Assn. v. Earl Fruit Co., 53 Pac. Rep. 697;

Hill v. McKay, 94 Cal. 5;

Rayfield v. Van Meter, 52 Pac. Rep. 666.

There is no evidence of any attempt to sell any of these hops in the Sacramento market. As a matter of fact on November 4, 1912, 400 of the bales

were at Milwaukee, 440 of the bales were in New York, 639 of the bales were in Chicago and 345 of the bales en route east (p. 342).

It is very evident that there was no attempt to sell the hops in the Sacramento market and there was no attempt to prove the market value in the Eastern market where the hops were sold and that therefore the whole scheme of proving damages by means of sales carried on through Eastern markets was absolutely improper.

AS TO ERROR BECAUSE OF PERMITTING TESTIMONY WITH REFERENCE TO CUSTOM TO DELIVER AT ANY TIME PRIOR TO THE END OF THE SEASON.

Horst in order to be able to get the advantage of the lesser price for goods in the end of February, 1912, attempted to prove a custom by his testimony that there was a custom to allow the seller the option to deliver hops at any time before the following March.

No other man in the hop business knew of the custom.

Horst, himself, when he offered a contract to Pabst inserted deliveries September to December (p. 111).

Drescher who had been in the business for forty years as a hop grower and dealer in the Cosumnes District in Sacramento, testified:

"There is no custom of that kind to my knowledge. Unless stated to the contrary such deliveries are usually made as soon as the product is available" (p. 94).

Moreover that is the law on the subject.

We respectfully submit that a custom is an unwritten law established by long usage and it must be so certain that the proof leaves the custom definite. It must also be reasonable and must be continued without any interruption.

Am. & Eng. Enc., Vol. 29, page 367.

It is not enough that it be the usage or custom of one of the parties to the contract, or of some persons engaged in the trade, but it must be the general usage or custom of those engaged in the trade at the place where the contract was made, or was to be performed; it must be so general that those who are engaged in the trade are to be presumed to know of its existence.

Minnis v. Nelson, 43 Fed. Rep. 779.

The adopting of a peculiar mode of doing business by even two-thirds merely of those engaged in doing this particular business has been held not sufficient to make that mode a custom, it appearing that the usage was limited.

Bryant v. Brown, 53 Atl. Rep. 56.

AS TO ERROR BECAUSE OF REJECTION OF TESTIMONY OF WITNESSES WHO TESTIFIED AS TO THE IMPROPER MANNER OF PICKING HOPS BY HORST COMPANY.

We respectfully submit that the testimony of witnesses Chalmers and Traganza was not only competent, relevant and material but was addressed to one of the absolutely material points of the case. The cleanliness of the pick of Horst Cosumnes Ranches in 1912 was an important factor in determining whether or not the hops were choice.

- (a) Samples 1 to 20 represented the entire hop output of the Cosumnes ranch and were fair representatives of the bales from that ranch, part of which bales were involved in the contract at one time (150 to 175 bales of so-called pick ups were not included but were of the same general nature except that the hops were lacerated in the process of picking).
- (b) Experts on both sides differed as to whether or not samples 1 to 20 evidenced cleanly picked hops.
- (c) The jury was entitled to consider and weigh the testimony of the experts on each side.
- (d) The testimony of Chalmers and Traganza to the effect that they saw stems and leaves being run into the hops (from which hops when baled the samples were taken) tended to corroborate the expert opinion of the defendant's experts that the samples did not show cleanly picked hops and was therefore admissible.
- (e) This evidence was admissible as rebutting the testimony of Mr. Horst and his witnesses which in general was to the effect that the hops were very cleanly picked that year and that all bales were picked alike.

During the taking of the testimony the Court ruled as follows (p. 466):

"Now, Mr. Powers, if this witness will testify that he knows that they were the hops that are now in controversy here, the identical hops, I will let him testify. You have got to prove that they are the identical hops, otherwise it is wholly immaterial."

It was manifestly impossible to provide such testimony by the one witness then on the stand. But the record already showed that with the exception of 150 bales of pickings all the remaining Horst bales were identical in character and that samples 1 to 20 were taken from these bales and this witness was testifying as to the physical conditions under which these bales from which samples 1 to 20 were taken were baled.

It is submitted that it was sufficient and the best evidence obtainable to show that the witnesses saw leaves and stems being run into the general lot from which the bales were made up because out of these hops in said bales samples 1 to 20 were taken and forwarded by plaintiff to defendant.

Moreover testimony is relevant even though its connection with the hops in question could only be proven by other evidence than that given by this one witness.

Abundant connection had already been introduced.

Moreover Horst testified (p. 366) that he was ready, able and willing to deliver to defendant 2000

bales equal to samples 21, 22, 23 and 24 out of the 3062 bales left in his hands on November 4, 1912, which latter were a part of the 4000 bales of hops which were being picked and baled at the time these witnesses were visiting Horst's hop house.

Certainly any evidence that Horst Company was fraudulently attempting to prepare these bales in such a way as to make them weigh more than usual by permitting stems and twigs to go in the hops while being picked was admissible, especially when Horst Company had a contract which they thought they would force Pabst to take.

It must be remembered that the Horst Company's theory is that it could require Pabst Company to accept "air-dried" hops.

The Horst Company were the only persons who manufactured "air-dried" hops and that manufacture took place in the hop house where Chalmers and Traganza saw the picking and drying operation.

Moreover the theory of the Horst people was that choice hops meant a hop of the best average quality for any particular year (p. 208).

Consequently the Horst Company considered that they had Pabst Company bound to a contract to take the best average of any crop that they should produce during the year 1912 on the Cosumnes ranches. Witnesses Chalmers and Traganza were testifying as to the manner in which these hops were being picked and dried.

Horst testified that the entire 4000 bales were of the same degree of choiceness:

"One bale was substantially as good as another" (p. 105).

And he also testified (p. 106) to the question:

"You say uniform in quality? Yes, a crop may be uniform in quality. Simply the skill in picking and drying them makes uniformity in quality."

The testimony of these witnesses was in rebuttal to the questions asked Mr. Horst.

The samples were merely representatives of the grade of hops to be supplied. The question whether or not samples 1 to 20 evidenced hops that were cleanly picked was a question for the jury to determine. The main question here was whether or not the samples in suit alleged to accurately represent the bales to be delivered contained so excessive an amount of leaves and stems as to warrant the claim that they did not represent choice hops because not cleanly picked.

The Supreme Court of California in the case of San Pedro Lumber Company v. Reynolds, 53 Pac. 410-415 says:

"The effect of the evidence establishing fraud in specific instances is thus declared by Wharton in his work on Evidence (p. 39): "We may, in fine, conclude generally that, when a mass of action is examined in block, it is allowable to assume, as a presumption of fact, that if a part of it is tainted in a particular way, the rest is so tainted. Thus, where most of the vouchers produced by a party in proving his accounts show an overcharging of items, it may be inferred, as a presumption of fact, that a like proportion of the items not vouched are overcharged."

In People v. Walden, 51 Cal. 588, the Court said:

"Presumptions of fact embrace: 'All the connections and relations between the facts proved and the hypotheses stated and defended, whether they are mechanical and physical or of a purely moral nature. It is the class of presumptions which prevails in the ordinary affairs of like, namely, the process of certaining one fact from the existence of another without the aid of any rule of law, and therefore it fails within the exclusive province of the jury.'"

In Lyon v. Hancock, 35 Cal. 372, the Court said:

"Suppose, upon coming to the street, the defendant had found two women, instead of one, of equal respectability and character, one of whom must have cast the brickbat, one the wife of his friend, the other of his enemy, would not the friendship of the one and the enmity of the other constitute probabilities to be taken into account in determining which perpetrated the act? Other probabilities being equal, as we have supposed, no one would hesitate to say that the act had been committed by the wife of the defendant's enemy, and not by the wife of his friend."

17 Cyc., 820;

- 1 Moore on Facts, Sec. 516;
- 1 Moore on Facts, Sec. 548a;

Schmitt v. Trowbridge, 21 Fed. Cases 12,468;

Commonwealth v. Kendrick, 18 N. E. 230;

Liverpool & L. & G. Ins. v. Southern Pacific Co., 125 Cal. 434; 58 Pac. 55;

1 Wigmore on Evidence, Sec. 441;

Commonwealth v. Goodman, 97 Mass. 117;

Central Vermont R. Co. v. Soper, 59 Fed. 879-890;

Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454;

Barreda v. Silsbee, 62 U.S. 146;

1 Greenleaf on Evidence, Secs. 112-113;

Luman v. Golden Ancient C. Mining Co., 74 Pac. 307, 311; 140 Cal. 700;

Jones on Evidence, Sec. 357;

Burley v. German American Bank, 111 U. S. 221;

Garfield v. Knights Ferry Water Co., 14 Cal. 35:

Birch v. Hale, 99 Cal. 299 (33 Pac. 1088);

Fey v. Society, 120 Wis. 358;

Lowe v. Hart, 90 N. Y. 457-461;

San Pedro Lumber Co. v. Reynolds, 121 Cal. 74; 53 Pac. 410-415;

Faucett v. Nicholls, 64 N. Y. 377;

1 Wharton on Evidence, Sec. 43;

People v. Walden, 51 Cal. 58;

Lyon v. Hancock, 35 Cal. 372.

When a material fact is not proved by direct testimony it may be rationally inferred by the Court or jury from the facts which have been so proved, even though the inference be not a necessary one.

17 Cyc., 820.

Juries must often reason according to probabilities, drawing an inference that the main fact in issue existed, from collateral facts not directly proving, but strongly tending to prove, its existence. The vital question in such cases is the cogency of the proof afforded by the secondary facts.

## 1 Moore on Facts, Sec. 516.

It was not necessary for Mr. Chalmers or Mr. Traganza to follow the leaves and stems which they saw being rushed into the kiln to see whether or not they went into the two thousand bales designed for Pabst. From the very nature of it, it was impossible and yet we assert with confidence that the mere fact that plaintiff's employees for two hours were seen to be running leaves and stems into the hops which were subsequently baled and from which bales the samples were taken on which offer of delivery was made, should carry with it some degree of presumption that such extraneous matter found its way into some of the bales of hops and presumably into all of them as all were declared to be equally choice. It was a transaction which might fairly be held by the jury to characterize the entire proceedings while Horst Company were picking, drying and bailing their Cosumnes hops, and if the jury believed it did in whole or in part characterize the whole proceedings they might have believed from the facts sought to be proved that it so strongly tended to corroborate defendant's witnesses that the crop was not cleanly picked as to have been determinative of the action.

In an action to recover back an alleged excess of internal revenue taxes paid on matches, the extent to which, if any, the plaintiffs overran the number of matches for which revenue stamps were affixed was in dispute, Judge Brown charged the jury as follows:

"It is impossible for the government to count the matches in those boxes; but where we find one or two or a few boxes in a case overrunning, it is a fair presumption that all the boxes in the case overran; and, where you find boxes in one case overrunning, it is fair to be presumed that all the boxes in that class overrun; but it would not follow that if other matches were made of a different class, or if they were boxed differently, as if the boxes were differently shaped or of different sizes, they would all overrun; but here there were one hundred thousand boxes of a certain size, the matches being all of a size, and of a certain quality of timber. And you find, in that number of boxes, that twenty of fifty boxes, indifferently chosen, overran, and none of them underran. It would be a fair presumption that the entire one hundred thousand would overrun."

1 Moore on Facts, Sec. 548a;

Schmitt v. Trowbridge, 21 Fed. Cases No. 12,468;

Commonwealth v. Kendrick, 18 N. E. 230.

In the case of Liverpool & L. & G. Ins. Co. v. Southern Pacific Co., 58 Pac. (Cal.) 55, which was an action brought against the Southern Pacific Company on a claim that certain building had been negligently set afire by reason of one of the Southern Pacific Company's engines the Supreme Court of California said in respect of admission of certain facts:

"The evidence as to the cause and origin of the fire was circumstantial. As a part of the instruction, the Court said: 'If, upon the whole evidence, and taking into consideration all the conditions and circumstances surrounding the fire, you find it to be more probable that the fire was caused by sparks escaping from the swing engine than from any other cause, your finding upon that point, to wit, the origin of the fire, should be accordingly.' This portion of the instruction is especially criticized as a declaration to the jury that they might reach a determination upon an important fact from mere conjecture, guess, or supposition, without any evidence in support of it: that they were told that they could reach a verdict upon the doctrine of probabilities; and it is said that a case is not proven by a preponderance of evidence when a mere probability is established. We think, under the facts and circumstances of this case, that this criticism is also without merit. The question of the origin of the fire was one to be determined by circumstantial evidence. No one saw a spark from the engine alight upon and set fire to the roof of the ice house. It was, then, under peculiar circumstances of this case, a proposition for the plaintiff to establish that the probability was that the engine occasioned the fire. Nor does the use of the word 'Probability' in the instruction of the

Court, carry the question into the domain of mere conjecture and surmise. In civil cases which are decided in favor of the litigant upon a mere preponderance of evidence, the rule of decision is, after all, but a rule of probability, and this is well recognized. Says Greenleaf: 'In civil cases \* \* \* it is not necessary that the minds of the jurors be freed from all doubt. It is their duty to decide in favor of the party on whose side the weight of evidence preponderates, and according to the reasonable probability of truth.' And again 'A presumption of fact is an inference which a reasonable man would draw from certain facts which have been proved to him. Its basis is in logic; its source is probability'. 'Circumstantial evidence is of two kinds, namely, \* \* \* and uncertain, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by process of reasoning', L. Greenleaf (15th Ed.), pp. 23, 24, 72. Court, in Butcher v. Railroad Co., 67 Cal. 518, 8 Pac. 174: 'Evidence that sparks and burning coals were frequently dropped by engines passing upon the same road upon previous occasions has been held to be relevant and competent to show negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter.' And further reference may be had to Sheldon v. Railroad Co., 14 N. Y. 218; Kelsey v. Railway Co., (S. D.) 45 N. W. 204; Yanktown Fire Ins. Co. v. Fremont, E. & M. V. R. Co., (S. D.) 64 N. W. 154; Longabaugh v. Railroad Co., 9 Nev. 271."

In Grand Trunk Railroad Co. v. Richardson, 91 U. S. 454, the Court said:

"If it had appeared that some of these engines did scatter fire then the fact of the passage of the two engines would have established such a possibility and probability. The plaintiffs met any possible claim, that none of the defendant's engines used in the vicinity could scatter fire, by showing affirmatively that some of them did. The plaintiffs thereby established the possibility, and consequent probability, that the damage resulted from the negligent act of the defendant; and clearly fastened upon it the burden of showing that the particular engines which crossed the bridge before the fire were both so constructed, regulated and operated as to prevent the scattering of fire. Proof that other engines have thrown fire as far as the building destroyed, offered in a case where the building is separated from the track, stands upon precisely the same footing as proof that other engines have 'Scattered fire, offered in a case where a railway bridge itself is first burned. The question in each case is, whether the fire can be thrown far enough to occasion the damage. It is thrown far enough when 'scattered' in one case, as clearly as when thrown to the distant building destroyed, in the other."

# AS TO ERROR IN REFUSING EVIDENCE THAT HOPS WERE TOO GREEN WHEN PICKED BY HORST COMPANY.

Mr. Horst proved the picking started August 12th, and ended September 7th. Chalmers testified that he was familiar with the hops in that district August 12th, the same year and at that time the crop was too green to pick and was too green until from the 20th to 25th of August, the same year.

Two contracts were introduced showing agreements of Horst Company to delivery of early hops.

Horst, himself testified that breweries were "having hard skidding" for hops because of the shortage in 1911, in which year hops went to the extraordinary price of 40 cents.

A demand therefore was created for consumption in 1912.

Early deliveries in 1912 were desirable.

Hence over-zealousness in delivery might easily mean picking of immature berries.

Hop berries have color and qualities when green that are not capable of being recognized in the dried samples by one who does not know what the difference in appearance is of a hop which has been picked when immature from one that has been picked when fully ripe.

It was obviously an expert question, whether or not the samples in suit were representatives of choice hops. One of the chief factors in determining whether or not hops are choice is maturity of the hop when picked.

If immaturely picked they were not choice.

Plaintiff proposed to deliver to Pabst two thousand bales of hops of which these samples were representative.

Experts differed as to whether or not the samples represented properly matured hops. This was obviously a question for the jury and the testimony of Chalmers in respect thereof is of vital importance

to the Horst Company and its rejection prejudicial error.

Testimony of experts as to the condition of the berry with reference to immaturity due to greenness of picking was addressed to a fact known only to experts, that is to say: persons having experience in the color of hop berries when ripe.

Chalmers had been in the hop business in the Cosumnes district for over thirty years and knew the Horst ranch and visited it during the picking season of 1912.

CHALMERS' TESTIMONY WITH REFERENCE TO THE GREEN-NESS OF THE HOPS WAS FIRST INTRODUCED WITHOUT ANY OBJECTION ON THE PART OF HORST COMPANY'S COUNSEL.

The record shows at page 303 that the question was asked witness Chalmers as follows:

"Q. What was the condition of the hops in the Cosumnes district with reference to ripeness on or about August 12th, 1912?

A. They were green, too green to pick. They ripened from about the 20th to the 25th of August. There were no hops ready to pick before that."

We respectfully submit that this testimony was eminently proper and was addressed to an issue in the case. Witness Horst had testified (p. 105) with reference to the hops that 4500 bales of hops picked at the ranch in question

"with the exception of 150 bales, all the rest of the bales are of equal grade. One bale was substantially as good as the other" \* \* \* "We used a machine. We started in picking the ripest first and by the time we got them picked, the hops were no riper at the end than the hops we started to pick at the beginning. \* \* \* The conditions being the same on our land as the conditions on other people's land our hops ripen substantially as other people's ripen."

# Again at page 115:

"The grading of hops is like the grading of other commodities, such as wheat, and things of that kind and with hops the *picking*, *packing* and curing has a great deal to do with them."

# Again at page 123 Horst testified:

"The soundness of hops is produced by drying and curing. The factors which go to make up the value of a hop are the district in which it is grown, the time of picking, the proper picking as to the season, and the fatness and fullness of the hop."

We submit therefore that no objection was introduced as to the evidence while the witness was on the stand nor until after counsel for Pabst Company began to make his argument.

While the counsel was arguing the case he was interrupted by the attorney for the Horst Company so that the testimony with reference to the greenness of the hops was stricken out. Counsel for Pabst Company called the attention of the Court to the fact that the judge was mistaken and said that only so much of Chalmers' testimony as referred to picking had been stricken out and then the Court ruled it was irrelevant.

We respectfully submit that the evidence was material and proper and that it would have been error to refuse to allow the testimony and that it was a flagrant error to strike out the evidence when the case was closed and during the argument of the case.

## AS TO ERROR IN ALLOWING GROWERS TO TESTIFY AS EX-PERTS WHEN THEY KNEW NOTHING OF THE MARKET.

Several growers, neighbors of Horst, in the Cosumnes district had been shown various samples of hops made up in a peculiar way and they were caused to sign a written statement that they were competent to judge of the quality of Cosumnes river hops and that they considered certain hops equal to or better than choice Cosumnes hops of the year 1912. Mr. Chalmers testified that he refused to sign his as choice Cosumnes hops but nevertheless they produced a written statement to that effect. Mr. Mahon testified:

"I signed it with the understanding that the word 'choice' was to be erased. I did not consider the hops choice to my opinion."

Nevertheless Horst Company introduced Paul E. Peterson and about 10 or 15 other growers who had signed such statements and had them testify. It will be remembered that Mr. Horst testified that he had had a great deal of litigation and that "I prepared for the lawsuit before we picked the crop" (p. 135) and as preparation for the trial he got the neighbors to sign their names to papers, stating that they had

examined some of his samples thinking they were helping make a market for Cosumnes hops. Chalmers testified that his signature was obtained without him reading the paper and when Horst's employees

"said they were going to get a better price for Cosumnes hops and I signed that, but not as choice hops. I would not have signed anything in the world like that if I had stopped to read the paper over" (p. 307).

### Mahon testified:

"They said they wanted me to sign the statement to work up a trade with the brewers for Cosumnes River hops" (p. 291).

With these neighbors "thus prepared" they put them on the witness stand as "experts" and had them testify as to the quality of the hops.

After Peterson and one or two others testified it was stipulated that the other growers if called as witnesses would testify

"to certain facts concerning the experience and capacity of experts that the witnesses would be deemed to have testified in the same manner as the other growers, and that defendant should be deemed to have the same exceptions and objections, and that the witnesses would be deemed to have the same experience and qualifications as the experts and no more than the grower witnesses who have already testified and that the defendant would have the same objections and exceptions to their testimony as not being expert" (p. 141).

Peterson's testimony (p. 124) was that he had been in hop business twenty-five years; that he was familiar with the supervision and care-taking of hops; that he first grew them in 1912 and did not see the 1911 crop. "I have sold hops. Generally sell my hops as choice hops." And then over the objection of counsel for Pabst Company he testified as to the quality of the hops and as to the character of the hops and their picking.

On cross-examination he testified:

"I do not pretend to be a hop expert. My knowledge has been gained by selling and raising them for 25 years. I have never bought hops for market. My experience has been gained by getting them ready for the market" (p. 128).

We respectfully submit that the question here as to the choiceness of hops was what brewers and hop dealers considered choice hops, and not what growers considered choice. Hop experts in this case must be those familiar with the uses and requirements of the trade concerning dealings of brewers such as Pabst with dealers such as Horst Company.

### IN RE EXPERT EVIDENCE OF FARMERS.

Wigmore on evidence quotes with approval the definition of an expert given by Justice Foster in Ellinwood v. Bragg, 52 N. H. 489, as follows:

"The subject must be one peculiar and exceptional, concerning which some explanation, such as peculiar knowledge alone can afford, is required in order to render it intelligible to the comprehension had understanding of an ordinary man."

Wigmore on Evidence, Sec. 1923.

In this particular instance the peculiar knowledge was that of men who knew the value of hops to brewers purchasing the same from hop dealers in the Cosumnes district near Sacramento and the qualities of such hops as would be described by hop experts as "choice".

Experts in this instance were necessarily those who knew the usual tendencies of growers willing to sell and of brewers willing to buy where the qualification of choiceness was under discussion.

Witness Peterson's only knowledge of what happened between brewers and hop merchants was the same as that of the jurors themselves.

The mere fact that Peterson had himself sold his own crop of Cosumnes hops to a dealer did not make him an expert whose opinion as to what that dealer could do with those hops when offered to a brewer, the ultimate user, had any value to the jury.

Peterson specifically disclaimed being a hop expert. He did not claim to ever have examined any hops except his own. He did not claim ever to have been party to any sale of any hops but his own. He did not claim to know what was the usual motive in moving the brewer to buy or the hop merchant in selling either as to price or as to evidence of choiceness.

Wigmore says concerning qualifications of an expert as to handwriting, Sec. 2012:

"But the opinion rule declares it useless to listen to the views of an ordinary or lay witness when based merely on the inspection of specimens which the Jury having them in hand can judge as well as he; hence an expert under the opinion rule, signifies one who by a study of or experience with writings is able to afford the tribunal special assistance."

So with a hop expert. It is necessarily a man who had a special experience in the buying and selling of hops, and examined samples which were accustomed to be accepted by brewers purchasing from dealers and being offered by dealers to brewers as choice.

What a farmer, like Peterson, dealing with one crop of hops thought, was wholly inadmissible.

The California Court has said:

"During the progress of a trial, it became important to determine whether or not two certain pieces of cloth were of the same texture and quality. Expert evidence was introduced upon this question, and we think properly introduced. It was a matter upon which the ordinary juror, if left to his own knowledge, would be very unlikely to form a correct judgment. Persons experienced in dealing in and handling such cloths would be more competent to pass upon the issue presented. It was a matter not coming within the common knowledge and common experience of men, and for that reason witnesses with special knowledge might well be called upon to give the jurors the benefit of that knowledge and experience in the form of expert evidence."

People v. Lovren, 119 Cal. 88, 91.

The knowledge and experience there was as to the similarity of the texture and quality of certain cloth.

The knowledge and experience required in the case at bar was as to whether or not the quality of certain hops evidenced by samples was such as was accepted by merchants selling to brewers and brewers buying from merchants as choice and to the price of choice goods where brewers were willing to buy and dealers willing to sell within a reasonable time after November 4, 1912. This was not information of a kind that a hop grower selling his own crop without knowing anything about the customs and habits of hop dealers and brewers was qualified to testify to.

Wigmore on Evidence, Sec. 717, says:

"Value is, of course, the rate at which an exchange would in fact be made at this moment by the purchasing and selling community. Hence a knowledge of what an article ought to exchange for is not a knowledge of value, at least in the sense in which the Courts regard it. Nor is a knowledge of the various qualities and uses of an article sufficient if it stops short of including the exchangeable rate which these qualities actually make it. In short where there is a market value, the knowledge of the witness must be of this market value."

# AS TO ERROR IN ALLOWING TESTIMONY OF HORST IN REBUTTAL.

Samples 21 to 24 were sent as type samples. The Horst Company claimed that samples 25 to 38 tendered by them to Pabst Company were represented as equal to type samples 21 to 24. They did

not attempt to offer samples 1 to 20 as equal to samples 21 to 24. They never tendered Pabst Company samples 1 to 20 as deliveries equal to samples 21 to 24.

Consequently it was error for the Court to permit Horst to be recalled in rebuttal to testify that 3042 bales which he had on hand from which samples 1 to 20 were drawn, were equal to samples 21 to 24 and capable of delivery thereon.

Pabst Company's counsel had already attempted to cross-examine Horst on this subject and Horst Company had objected to the question.

Not only was it error for the Court to open up this case after the evidence was all in to allow Horst Company to open up a new element which was a part of their main case, but under the circumstances it was error of a kind, which worked in a very detrimental way to the Pabst Company because it prevented them from properly preparing a defense to this line because they had a right to rely upon the former ruling.

#### AS TO PREJUDICIAL CHARACTER OF ERRORS.

The market price of Cosumnes hops at Sacramento in November, 1912, was not less than 17 cents. It must be apparent from the fact that Pabst Company proved by testimony supported by cancelled checks, that it bought 818 bales of Cosumnes hops from November 13 to 25, 1912, at

prices ranging from 21 cents to 23 cents (which prices would be equivalent to 19½ cents to 21½ cents in Sacramento) and that Mr. Drescher actually sold to dealers in Sacramento 621 bales Cosumnes hops in November, December and January, 1912, at prices ranging from 17 cents to 18 cents, and that Mr. Sweeney bought 1500 bales in Sacramento in November, 1912, at 183/4 cents; that the jury would have found that the damages was the amount obtained by multiplying 400,000 lbs. (2000 bales) by the difference between 20 cents and whatever sale price they should have determined to be the market price at Sacramento—certainly not less than 17 cents, or a total of not to exceed \$12,000; but for the testimony of Mr. Horst and Mr. Lange that it cost \$4459.30 to sell air-dried Cosumnes hops at prices ranging from 14 cents to 17 cents during the same months.

The introductions of the Horst-Lange tabulations was therefore necessarily prejudicial error.

We are aware that there is a new trend of decisions with reference to the admission of books of very large concerns where there is such an enormous amount of business done that it becomes practically impossible that the litigant had conducted its business inaccurately because the number of employees, oftentimes ranging into the thousands, check over the daily transactions of each other and cannot be presumed to keep such books inaccurately.

But in such case, before the entries from the books are admitted, testimony very carefully checked is introduced to establish the necessity of the presumption that the books have been properly kept. In this case no person making entry in the books was offered to prove the manner of keeping the books, and no witnesses were sworn to testify concerning entries except the principal beneficiary of the self-serving declaration, who proudly testified (p. 135):

"I prepared for the law suit before I picked the crop. I have had considerable experience in litigation. I always prepare for law suits immediately on their appearing in sight."

His manner of preparing is shown in the testimony. He actually produced statements as to the choiceness of his hops, signed by his neighbors in the Cosumnes district, as early as October 23, 1912, before the hops had been rejected by Pabst on November 4, 1912.

Some of the witnesses testified that these statements were signed under fraudulent representations that they were to be used to create a market for Cosumnes hops. They were Cosumnes hop growers.

The other witness as to the books was Horst's man Friday, Lange, who is equally proud of testifying that he had been Mr. Horst's assistant for ten years. They are both professional litigators.

But they did not testify to any number of witnesses being required for the primary proof. In

fact their testimony shows that two witnesses, to wit, the managers of the Chicago and New York offices could by depositions have given all the facts concerning prices obtained and overhead charges.

Certainly their own testimony shows they are not witnesses of a character whom the Court would ordinarily permit to introduce secondary evidence drawn from other secondary evidence, especially where, as in this case, the witnesses having the primary evidence, to wit: the managers of the New York and Chicago offices, and the bookkeeper of the San Francisco office, were available to the Horst Company and not sworn as witnesses, and Mr. Zipfel, who made the entries of the movements in the stock book (p. 228) was offered as a witness concerning the choiceness of the hops, but not as to the condition of the stock book. Their manner of evading cross-examination also shows that their secondary evidence should be received with caution.

The testimony rejected by the Court with reference to the quality, value, and character of Cosumnes hops, other than air-dried hops, was offered in direct response to the allegations made in the Pabst counterclaim, which specifically alleged (p. 32) a sale equal in all respects to the samples presented and submitted by Pabst Company which was specifically denied by defendant (p. 37).

Nowhere in the counterclaim or in the answer thereto is any mention made of air-dried hops.

For this reason and because in Pabst Company's answer it is alleged that Horst Company agreed

to make deliveries of choice Cosumnes hops (no mention being made of "air-dried") equal to certain samples (pp. 28 and 29), it was error to limit testimony to "air-dried" hops.

All evidence with reference to sale price of choice Cosumnes hops in November, 1912, was admissible.

It was for the jury to decide the effect of the evidence and whether the final contract was a quality or a sample contract.

The testimony given by Chalmers and Traganza concerning the picking of hops in an improper manner, and the immaturity of the Horst hops when picked should not have been stricken out. These questions went to the vital question as to the character of the hops from which samples 1 to 20 were drawn.

Mr. Lange testified that it was the habit to draw one sample out of each 20 bales.

Mr. Horst testified that all these bales were of the same character and that all were choice.

Certainly Chalmers' and Traganza's testimony was in rebuttal of this testimony of Horst.

Again the testimony of hop growers as to quality of samples submitted by a dealer to a brewer for brewing purposes, who specifically denied any claim to being hop experts, was prejudicial error.

While we do not wish to abandon the other points not dwelt upon as fully as those last quoted,

such for example as the refusal to permit the witness Conrad to answer as to whether or not there was any reason why the hops produced by Horst in 1912 should be sold cheaper than any other hops, and the overruling of the objection to the question asked Mr. Horst, viz: how much he estimated his overhead expenses were increased because of the sale of Pabst hops, which are evident errors; yet we feel that the great importance of those errors herein dwelt upon in extenso and we fear the Court may feel ad nauseatum, makes it unnecessary for us to more than mention them.

In this regard we wish to apologize to the Court for being so prolix concerning insertion herein of evidence showing the manner of keeping the books and the making of deductions therefrom, but we feel certain that when the Court realizes that we are asking this Court to find as error the introduction in evidence of compilations from said books under what would ordinarily appear to be a breach of fundamental rules of evidence the necessity for quoting the evidence itself, rather than stating our understanding of it will be apparent.

The total number of bales in question was 2000. The weight thereof was approximately 400,000 pounds.

Other dealers sold in November, 1912, at Sacramento for 17 cents to 19 cents. Brewers bought for from  $20\frac{1}{2}$  cents to  $22\frac{1}{2}$  cents at the same time.

Certainly the reasonable sale price of hops during that period could not have been held to be less than 17 cents but for the improper evidence.

This would make the loss by the breach of contract to Horst at the very utmost 3 cents per pound on the said 400,000 lbs. or \$12,000.00.

It must be apparent, therefore, that when the jury gave a verdict of \$22,625.30, they were moved by the evidence on the part of Horst, that he was compelled to sell hops belonging to Pabst at various prices, many of which ranged from 14 cents, 141/2 cents to 15 cents in November, 1912, while paving salaries to a New York manager of \$500.00 per month, with an assistant at \$150.00 per month, and to a Chicago manager of \$350.00 per month; and must have accepted as controlling the testimony of Mr. Lange that it was proper to prorate all the overhead expenses on the basis of 1346 bales to Pabst and 2536 bales to Horst, notwithstanding the fact that on November 4, 1912, Horst's San Francisco office had 10,500 bales to sell without allotting any of said overhead to any but 3882 bales.

If, therefore, this Court finds that there was any error in the introduction of the books or of the manner of computation of overhead, or of the manner of application of said overhead to the Pabst goods, or the curtailment of evidence to air-dried hops or the refusal of testimony as to the manner of picking and immaturity when picked or the improper use of farmer experts for quality of brew-

ing hops, we respectfully submit such error was prejudicial.

We respectfully submit that because of the numerous errors herein quoted, the decision here in question should be set aside, and a new trial held, that justice may be done.

Dated, San Francisco, October 30, 1915.

Respectfully submitted,

Heller, Powers & Ehrman, Attorneys for Plaintiff in Error.

THOMAS J. GEARY,
JAMES L. ROBISON,
Of Counsel.

IN THE

# United States Circuit Court of Appeals

# For the Ninth Circuit

PABST BREWING COMPANY, a Corporation,

Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY, a Corporation,

Defendant in Error.

# BRIEF FOR DEFENDANT IN ERROR.

DEVLIN & DEVLIN,
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Attorneys for Defendant in Error.

Filed this	day of November, 1915.
	FRANK D. MONCKTON, Clerk.
D.	Danuty Clark



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#### IN THE

# United States Circuit Court of Appeals For the Ninth Circuit.

PABST BREWING COMPANY, a Corporation,

Plaintiff in Error,

VS.

E. CLEMENS HORST COMPANY, a Corporation,

Defendant in Error.)

### BRIEF OF DEFENDANT IN ERROR.

### Plaintiff Below.

This is an action to recover damages for a breach of contract. For convenience we shall call the plaintiff in error (defendant below) the "Pabst Company", and the defendant in error (plaintiff below) the "Horst Company".

The Horst Company, whose principal place of business is in California, is a grower of hops. The Pabst Company is a brewing company whose place of business is in Milwaukee, Wisconsin.

The Horst Company sold the Pabst Company at an agreed price a certain quantity of choice air dried Cosumnes hops. The original contract did not require samples to be submitted. Samples were in fact submitted. Horst Company submitted to defendant certain samples of hops of which it tendered delivery. Pabst Company refused to accept on the ground that they were not of the quality required by the contract. Pabst Company refused to accept samples submitted by Horst Company, and broke the contract. The telegram from Pabst Company breaking the contract is dated November 4, 1912, and is as follows:

E. Clemens Horst Co.,

San Francisco.

Cannot accept samples as they are not according to choice quality specified in contract. We herewith cancel contract for two thousand bales entered into with you because of your inability to comply with specifications.

PABST BRG. CO.

(Trans. pp. 57-58.)

To this the Horst Company replied:

Pabst Brewing Co.,

Milwaukee, Wis.

Replying to your yesterday's wire received today we disagree with your comments on quality of samples sent you and to your statement that we are unable to comply with our contracts with you. Please wire us in what respects you claim samples twenty-five to thirty-eight inclusive to be below contracted quality and whether you claim none of all samples sent you is equal contracted quality. Please also wire whether you will pay us decline in market if we consent cancellation two thousand bale sale we cannot release contracts without proper settlement. We suggest that our letter October eighteenth offers fairest method of adjusting matter. We are willing submit further samples and are willing that Chief Inspector of San Francisco Chamber of Commerce or other high class competent disinterested parties to be agreed upon shall pass upon quality.

E. CLEMENS HORST CO.

(Trans. page 587.)

Finally Pabst Company refused to have further discussion with Horst Company, and told it to take such action as it deemed proper, by a telegram dated November 7, 1912, as follows:

E. Clemens Horst Co.,

San Francisco.

Samples we sent you represent choice quality cosumnes which our contract specifies and to which none of your samples compare period our judgment and experience sufficient to warrant our action in cancelling contract because of insufficient quality samples submitted by you period have partially covered quality at higher than our contract price with you because of our rejection therefore will not entertain suggestion to pay you difference period will not have further discussion on this and if you consider our action arbitrary take such action as you may deem best for your interest.

PABST BRG. CO.

(Trans. page 59.)

The counsel for defendant below admitted that it cancelled the contract and repudiated it November 4, 1912. (Trans. page 181.)

All the samples—both those tendered by Horst Company to Pabst Company, and those submitted by Pabst Company to Horst Company—were in court, and submitted to the jury for inspection.

Experts were also called by both parties as to the qualities of the hops, and, as sometimes happens, the experts disagreed, one set claiming that the samples were of the kind called for by the contract, and the other asserting the contrary.

The jury returned a verdict in favor of the Horst Company.

The Court in instructing the jury stated the issues submitted to them for consideration and no better statement of the issues in the case can be made than that made by the trial judge. For the purpose of showing the issues which the jury were to try and determine, and the law applicable to them, we subjoin the instructions given by the trial judge.

#### CHARGE TO THE JURY.

THE COURT (orally): Gentlemen of the Jury, I ask your attention at this time for a few moments while I submit to you the principles of law that must govern you in your consideration of the evidence in this case for the purpose of arriving at a verdict. The action is one for the alleged breach of a contract for the sale of hops. While the cause has consumed some considerable period of time and has involved the taking of a large volume of evidence, I think that you will find when you come to consider it in the light of the instructions of the Court that it lies within rather narrow lines, and that you will have no difficulty in readily perceiving what the salient features of the case are that will call for your consideration. The Court will tell you what the legal effect of the correspondence between the parties is, and from that and the oral evidence that has been placed before you you will determine what the facts are which I shall indicate to you it is essential for you to find in order to reach a verdict; and with that view I shall now state to you the more specific principles that

will actuate you in your consideration of the evidence.

The telegraphic offers by the plaintiff and their acceptance by the defendant in August, 1911, as shown by the evidence, constituted in law a valid and binding contract as of that date, whereby the plaintiff obligated itself to sell and deliver and the defendant to accept and pay for two thousand bales of choice, air-dried Cosumnes hops of the crop of 1912, at the price of twenty cents a pound delivered on board the cars at Milwaukee, Wisconsin, plus freight, that is, freight to be paid by defendant in addition to the purchase price named; and this contract was in no respect modified or changed by the subsequent correspondence or negotiations of the parties. While this contract did not by its terms require plaintiff to submit samples of hops prior to delivery, the evidence shows without a conflict that the parties by their acts so construed it, and it hereby became one of the terms of the contract by which they were bound.

Under this contract, therefore, it was the duty of the plaintiff within a reasonable time after the harvesting of the crop of 1912 to submit to the defendant samples of hops of the quality specified in the contract and hold himself ready to deliver the quantity called for by the contract in due course, and it was the reciprocal duty of the defendant upon receipt of such samples, if of the quality specified, to accept delivery of the quantity named in the contract and pay for them

in accordance with its terms.

The evidence shows without controversy that plaintiff did in due time upon the harvesting of the crop of 1912 submit to the defendant samples of hops of that season's growth which he claimed and still claims represented hops of the character in all respects as called for by the contract, and represented himself as ready to deliver the quantity therein specified to the defendant. The

samples thus submitted were each and all rejected by the defendant as not representing the quality which it was entitled to demand under the contract, and thereafter, on November 4, 1912, defendant notified plaintiff by a telegram that it cancelled the contract, and refused to accept delivery of the hops tendered by plaintiff as not being of the grade or quality called for.

The first question, therefore, which you are called upon to determine in reaching a verdict is whether the samples thus submitted by plaintiff were of hops of the quality specified in the contract, since this is a question for the jury to determine and not one for the final decision of the If they were of that quality, and defendant. plaintiff was ready and able to deliver the quantity called for in accordance with the terms of the contract, the defendant could not aribtrarily repudiate the contract by claiming that the samples were not in accordance with the quality of hops stipulated. If, however, none of the samples submitted by plaintiff represented the character of hops called for by the contract, but were of an inferior grade, and plaintiff was unable to furnish samples of the required quality within the time given for delivery, then the defendant had a right to reject them and to say that it would not receive hops of that character. To be more specific, if of the first lot of samples shown to have been submitted by plaintiff to defendant there were some that answered to the contract quality, it was the duty of the defendant to accept such samples as represented the required quality and give the plaintiff an opportunity to make delivery of the hops contracted for in accordance therewith; and in such case the defendant, by rejecting them all and refusing to receive the delivery, was in default and guilty of a breach of the contract. And although none of the twenty samples first submitted were of the contract quality, nevertheless if those subsequently submitted by the plaintiff, or some of them, were of the contract quality, it was likewise the duty of the defendant to have accepted such as were of that quality, and to have given the plaintiff the opportunity to deliver hops equal in quality to such samples; and if in such case the defendant rejected them all without giving plaintiff the opportunity to deliver hops equal in quality to those that were up to the contract, then the defendant was in default and guilty of a breach. Again, if you find that both lots of samples submitted failed to come up to the contract quality, but find that under the contract the plaintiff had time after November 4, 1912, in which to make delivery, the defendant could not by attempting to cancel the contract on that date lawfully preclude the plaintiff from thereafter delivering hops of the contract quality within the time given for such delivery.

Some question has been made by the defendant in its evidence as to the sufficiency in number and size of the samples submitted by the plaintiff to fairly enable the quality of the hops to be properly passed on. In that regard, as it does not appear that the defendant ever made any objection to the plaintiff on that score, and the latter was left to assume that the samples sent were sufficient in number and size for the purpose for which they are sent, it is now too late for defendant to take advantage of that ob-

jection, even if well-founded.

Where the article sold is in its nature not entirely uniform in quality, a sample represents the character of a larger mass only approximately, and if the jury find that hops are in their nature not of an entirely uniform quality, and also find that as a matter of custom in the hop trade a sample is regarded as representing the average quality of an entire lot, then the defendant has his full rights if he obtains or may obtain in the entire quantity to be delivered the

aggregate or average of quality indicated by the sample. The fact that a number of samples was submitted does not necessarily imply an understanding that each bale of hops shall be equal to the same sample, or that a comparison is to be made separately with each bale of hops. What is a proper mode of applying the standard of quality is a question of fact which you are to decide from all the evidence in the case.

From what I have said you will understand that if the samples submitted by plaintiff did, as indicated, fairly represent the quality of hops called for in the contract, and that plaintiff was ready and able to deliver the required quantity within the time allowed him for the purpose, then defendant was not justified in attempting to cancel or repudiate its obligation to receive them, and the plaintiff will be entitled to recover the damages suffered by it through defendant's refusal to accept and pay for them. And whether plaintiff had the full quantity on hand or not would make no difference in that respect if he could have procured them in time to make delivery within the terms of the contract; and with reference to the time within which such delivery was to be made, I shall hereafter more fully instruct you.

If at the time of the receipt of defendant's telegram announcing that it cancelled the contract, plaintiff was ready and able, as I have indicated, to comply with its terms, he was entitled to treat this refusal as a complete breach which gave him the right, without further tender, to immediately commence an action for damages. The rule of damages for a breach of contract by a renunciation of it before the day of performance arrives is the amount that the injured party suffers by the continued breach down to the time performance is due, less any abatement by reason of steps by the injured party to protect himself which the law required him to take. That is,

if you find that the defendant was not justified in refusing to accept the hops in question, the plaintiff is entitled to such damages as will justly represent the amount of its loss between the date of the repudiation of the contract and the time at which it had to make complete delivery of the hops, less the amount he could save by a reasonably prompt disposition of the hops to others at the best price to be obtained, as hereinafter stated, such damages not to exceed the amount demanded in the complete,—which, I believe, is \$32,000.

Where a contract is made, as in the present instance, for the future delivery of a commodity not yet grown or produced, and no time is specified for delivery, the law implies ordinarily that delivery shall be made within a reasonable time after the commodity has been prepared for market. In this case, however, evidence has been introduced tending to show that there in the sale of hops of a crop to be grown no precise time is specified for delivery, it is understood by those dealing in the commodity that the seller or shipper has until the end of the shipping season in which to make delivery, and that this season extends from the time of picking or harvesting to the first of March of the following year. If you find that such a custom or trade usage existed and was known to the parties when the contract was made, then, the contract being silent as to the date of delivery, plaintiff had until the end of such shipping season to deliver the hops specified in the contract. If the hops tendered by plaintiff were of the quality specified in the contract and defendant consequently not justified in refusing their delivery, plaintiff was not required to make further tender of them, but if it had such hops on hand it could proceed to sell them at the best market price obtainable at the time and place of delivery; if there was no market price at the time and place of delivery then

at the market price at the nearest market for such commodity, or if there was no existing market price then at the best price obtainable; and if this was less than the contract price plaintiff is entitled to recover the difference between that price and the amount realized by the sale, plus any expenses reasonably incurred by plaintiff in excess of what it would have cost plaintiff to deliver the hops to defendant had the contract been completely performed. It is for the jury to decide what expenses, if any, thus claimed are, under the circumstances, justly and reasonably incurred. When in this case, as I have indicated, plaintiff was required under the law, upon a repudiation of the contract by the defendant, to proceed with due dilligence and expedition to dispose of the hops to the best advantage it could and thus reduce the damages resulting through defendant's breach, if you find there was a breach, he was only entitled to incur such expense in that regard as an ordinarily prudent man would have incurred, such as for brokerage, insurance, storage, cartage, and the like incidents. The mere fact that plaintiff may have paid out certain expenses in reselling the hops is not in itself sufficient to entitle him to recover the expenditures against the defendant unless the jury find that it was a reasonably iust and proper one which a man of ordinary business prudence would have considered necessary to incur for the purpose.

In this connection, evidence has been introduced tending to show that the plaintiff after it received notice from the defendant that the latter cancelled the contract began to sell the hops to others. If you find that at the time of the giving of such notice by the defendant to the plaintiff the plaintiff had a sufficient quantity of hops on hand of the quality required by the contract to fill it, and after such notice began to sell such hops to others in the usual and

ordinary manner in which hops are sold, and endeavored to obtain the best prices possible, you have a right to consider the prices obtained by the plaintiff on such resales in connection with the evidence as tending to establish the market prices of such hops at the time of such resales. If a contract for the sale of merchandise has been broken by the buyer, and the seller is compelled to resell at a loss, he is entitled to recover the difference between the contract price and the price that he has realized on a resale, together with his expenses, exclusive of interest, interest on this demand not being claimed.

If the time for delivery extends over a period of time, then for the purpose of fixing damages the market value to be considered is that of the last day of the period within which delivery may

be made under the contract.

Should you find that the defendant committed a breach of the contract as alleged, but that at the time the plaintiff did not have the full quantity of hops required to fulfill the contract in his possession or under his control, and thereby was not put to the expense of making a resale of the entire quantity called for by the contract, then the only damages which the plaintiff could recover as to the quantity not on hand would be the loss of profit which it would have made had the defendant completed the contract; and that profit would be the difference between the price at which the plaintiff could then have procured the hops required to fill the contract and the price at which they were contracted to be sold.

Those comprise the specific features of the charge with reference to the claim of the plain-

tiff.

As to defendant's counter-claim, I advise you, gentlemen of the jury, that there is no sufficient basis in the evidence upon which to rest a verdict for defendant on that demand.

There are certain general considerations

which it is proper for me to submit to you.

As I indicated to you at the opening, the law of the case is to be given to you by the Court, and you are bound by that, and bound to apply it to the evidence in the case in reaching your verdict. The facts, however, rest solely and exclusively within the province of the jury to find, and with that the Court is neither disposed nor permitted to in any wise interfere. We are permitted, within the jurisdiction that this Court exerts, to discuss the evidence with the jury if we see fit, but we are not much in the habit of doing so, because our observation of the intelligence of the class of jurors that we get in the federal courts is such that we do not find it necessary, and it is our habit usually to leave the consideration of the evidence free from any any suggestion by the Court as to its views.

Now in passing upon the facts in the case you necessarily pass upon the credibility of the witnesses, because that enters largely into the determination of what the facts are in a case where there is a conflict in the evidence, as has been very fully illustrated in this case. Where there is a conflict in the evidence the jury must solve that by the application of those usual and ordinary principles which I shall state to you in determining the credibility that you will accord

to the respective witnesses.

The plaintiff is bound always in a case to sustain the burden of proof upon the affirmative issues that arise out of the pleadings and involving his demand, and in order to recover he must sustain that by what is termed in the law a preponderance of the evidence. Now a preponderance of the evidence simply means that in the judgment of the jury, because they are the tribunal which passes upon that, the evidence on behalf of the plaintiff is in some respects stronger or more persuasive as a basis of their verdict than that presented on behalf of the defendant.

It does not mean that the plaintiff is bound to present a greater number of witnesses than the defendant in favor of his claim, because preponderance does not necessarily depend upon the greater number of witnesses. One or two witnesses, or a document or a presumption, may be of such effect by reason of its relation to the other facts in the case as to satisfy the jury that the truth lies in favor of that side, although a much larger number of witnesses my testify directly and positively to the contrary. So that you see your verdict will rest upon what you deem to be the strength of the evidence, independently of the number of witnesses on either side. You are not, however, to judge of the evidence of the witnesses arbitrarily, but your judgment in that respect is to be exercised with legal discretion and in subordination to the rules of evidence.

In this case, gentlemen of the jury, a very considerable portion of the evidence consists of what is termed, or has been here termed, expert tesimony. Now it is proper or it would not be admitted, but you are to understand, gentlemen of the jury, that your good judgment, any more than mine, is not to be swerved from its pedestal by considerations that may be suggested from the witness stand by so-called experts if they do not accord with your reason, based upon all the evidence in the case. The observation of courts in dealing with expert testimony is that almost invariably an expert being produced by one side or another seems unconsciously to deem it his duty to make out a case for the side by which he has been produced. Now that is not in any wise reflecting upon the character of experts,—it is human nature—but it is something that the jury may take into consideration in determining the value that they will ascribe to expert testimony in any case; and in this case you will have a right to apply it in determining the degree of weight or credibility,—because I assume that all the witnesses who have appeared before you are men of credibility,—that you will attach to that class of evidence.

So with reference to the testimony of any witness in the case, whether expert or other, you pass upon his credibility, and you do that by observing his demeanor and manner upon the stand and his apparent bias or prejudice or interest in the case, whether a pecuniary interest or a friendly one, whether an enmity which grows out of relations with the party or through the circumstances of being a rival in trade,—all those considerations you have a right to take into your judgment in determining the credibility that you will accord to any witness.

A witness is presumed by the law to tell the truth, and the jury, in the absence of anything to indicate that a witness has deviated from the truth, must give him the benefit of that presumption; but that does not mean, of course, that you are to abdicate your reason and judgment in passing upon the credibility of a witness, or that you are bound to believe him, no matter how strongly or positively he may assert a fact, if it is one which does not under all the circumstances accord with your judgment. It is in accordance with these principles that you pass upon the credibility of the witnesses and solve, according to your best judgment, the conflicts that have appeared in various particulars in the testimony in the case, and in this way you make up your minds as to what the facts are.

In this case, as I have perhaps sufficiently indicated to you, the crucial and pivotal question is as to the character of these hops. If the hops which were tendered by the plaintiff were of a character such as would be regarded in the trade as coming substantially within the quality specified in the contract in suit, then the plaintiff is entitled to have the contract enforced by an

award of such damages as you may find, within the principles I have stated, he has suffered. If, on the other hand, the hops, in your judgment, did not comply with the requirements of that contract as to their quality, then he is not entitled to recover, but your verdict in such event would be in favor of the defendant, which would carry defendant's costs.

In the federal courts, gentlemen of the jury, unlike the state system, the verdict of the jury is required to be unanimous. You cannot find a verdict by a less number than the entire twelve,

as you may under the present state law.

The clerk has prepared forms of verdict which you will find to meet your necessities in view of the suggestions I have made to you. There is a form here which will enable you by filling in the amount to express your verdict if you determine in favor of the plaintiff. Should your verdict be in favor of the defendant, there is a form which will express that conclusion.

(Pages 367-380.)

There was only one issue in the lower court—that was, was the defendant justified in cancelling its contract?

If it was, plaintiff of course could not recover.

In the brief of plaintiff in error many pages are devoted to arguing the weight and sufficiency of the evidence, rather than its admissibility. It argues also many questions settled and admitted by the pleadings, and also other matters settled by the Court in its instructions to the jury, to which no exception was taken.

It is elementary that if any evidence at all is

introduced on the issue before the jury which proves a fact in issue, or from which an inference may reasonably be drawn, the question as to whether considering other evidence, the jury came to an erroneous conclusion, cannot be argued on a writ of error; nor can the law as laid down by the Court in its charge to the jury be attacked when no exceptions were taken to the matter complained of; nor can matters not urged in the lower court be urged for the first time in the Appellate Court.

T.

THE ASSIGNMENTS OF ERROR CANNOT BE REVIEWED BECAUSE THE BILL OF EXCEPTIONS DOES NOT PURPORT TO CONTAIN ALL THE EVIDENCE.

The bill of exceptions in this case does not purport to contain all the evidence.

Therefore, no assignments of error relating to the admission or exclusion of evidence or to the instructions given and refused can be reviewed.

City of Milwaukee v. Shailer & Schniglau Co., 91 Fed. 726.

Even though it was certified that the bill of exceptions contained all the material evidence, no assignment of error can be reviewed where, by reference made in the charge of the court, it appears that important testimony touching the points in controversy is omitted.

City of Milwaukee r. Shailer, 91 Fed. 726.

Where the bill of exceptions does not contain or purport to contain, all the evidence, an erroneous ruling in the admission of evidence cannot be held prejudicial on appeal.

Brown v. Casey, 80 Cal. 504.

Objections to admission or rejection of evidence cannot be considered unless the bill of exceptions states affirmatively that all the evidence is set out therein.

> Taylor v. Boggs, 20 Ohio St. 516. Porter v. Hall, 11 Kan. 514.

Where the rulings depended on the proof they will be presumed correct if the record does not purport to set out the whole evidence.

Morgan v. Morgan, 35 Ala. 303.

## II.

### ASSIGNMENT OF ERRORS CLASSIFIED.

Assuming, however, that the assignments of error can be considered at all we would call the attention of the Court to the fact that the various points sought to be made by the plaintiff in error are not set out in their logical sequence, but are scattered in various forms through the brief. We shall tabulate them, in answer, as follows:

I. The question of air-dried hops and the contract between the parties.

- II. Questions relating to the proof of breach of contract.
- III. Questions arising as to proof of amounts received on resale of hops, selling expenses, vouchers, books of account, etc.

IV. Sundry other assignments.

#### III.

# AIR-DRIED HOPS, AND THE CONTRACT BETWEEN THE PARTIES.

Plaintiff in error devotes several pages in its brief to a discussion of whether the contract between the parties called for air-dried Cosumnes hops or not; and much space is devoted to the question of the Court erring in so defining the contract, and in confining the evidence to that subject. The answer to all this argument is:

1. The matter is settled by the pleadings.

The pleadings in this case admit that the contract between the plaintiff and defendant was for the sale and delivery of "Choice Cosumnes air-dried hops." The complaint as originally drawn stated in general terms that plaintiff agreed to sell and deliver two thousand bales of Cosumnes hops to be grown in the State of California for the year 1912. (Trans. page 1.)

Defendant in its answer denied that any contract was made as alleged in the complaint, but alleged the contract between the parties was that the plaintiff caused a telegram to be transmitted to the defendant, offering to sell one thousand bales of

"Choice Cosumnes air-dried hops;" that the defendant accepted said offer, and thereafter plaintiff transmitted another telegram to the defendant, offering to sell an additional one thousand bales of "Choice air-dried Cosumnes hops;" the defendant accepted the offer. (Trans. page 27.)

The plaintiff then amended its complaint, by leave of Court, to conform to the allegation contained in the answer, by adding the words: "choice airdried" before the word "hops". (Trans. page 4.)

Thus, by the pleadings of the parties, the article to be sold and delivered was "choice Cosumnes airdried hops", and the pages of the brief of the plaintiff in error devoted to the discussion of this subject are useless.

While the pleadings thus allege and admit that the contract was for the sale and delivery of two thousand bales of choice Cosumnes air-dried hops, the contract did not provide that the plaintiff below, Horst Company, "should submit samples", but inasmuch as samples were actually exchanged between the parties, the Court instructed the jury that the telegraphic offers by the plaintiff and their acceptance by the defendant constituted a binding contract whereby the plaintiff obligated itself to sell and deliver and the defendant obligated itself to accept and pay for two thousand bales of "choice air-dried Cosumnes hops"; and that this contract was in no respect modified or changed by the subsequent correspondence or negotiations of the parties. The Court, however, instructed the jury that, while the contract did not by its terms require the plaintiff below to submit samples of hops prior to delivery, the evidence showed that the parties by their acts so construed the contract, and that this therefrom became one of the terms of the contract by which they were bound. (Trans. page 368.) No exception was taken to these instructions.

- 2. The Court in its charge instructed the jury that the contract called for the sale and delivery of "Choice air-dried Cosumnes hops." No exception was taken to this charge, and therefore the matter cannot be considered here. Both sides to the controversy accepted this as correct.
- 3. Even if the question was open to debate, an inspection of the telegrams which passed between the parties shows that the article contracted for was, as admitted by the pleadings and declared by the Court, "Choice Cosumnes air-dried hops."
- 4. While it is unnecessary to enter into a discussion as to the difference existing between air-dried hops and kiln-dried hops, it may be said that air-dried hops are dried by forced air. On the other hand, kiln-dried hops are dried in an entirely different manner. The heat is inside, and comes from a stove in the building; while, in the case of the air-dried hops, the air is warmed outside the building and blown into the place where the hops are placed for drying. There is a distinction in quality between the hops treated by the different processes, because the air-dried hops retain the oils and resins better than the kiln-dried hops. This is supposed to be an

advantage, as the air-dried hops are superior in brewing qualities to the kiln-dried, as being cured by a slower and different process, that preserves the chemical qualities of the hops, making them very desirable for brewing purposes. On the other hand, as kiln-dried hops are dried at a higher temperature and by a different process, a part of the desirable quality of the hops is destroyed. While after curing the difference may not be so apparent to the eye, yet the difference in the grading process is very material. (Trans. pages 57, 101.)

#### IV.

#### CONTRACT MADE BY TELEGRAMS.

The plaintiff in error also attacks the instructions of the Court that the contract was made by the telegrams passing between the parties in 1911.

In answer to this contention, in the first place, it may be said that no exception was taken to such instruction of the Court.

In its assignment of errors, the plaintiff in error seeks to raise this question for the first time, but no exception was taken to the instruction of the Court on this point when the instructions were given. (See Trans. page 380.)

Therefore it is waived.

In the second place the pleadings admit that the contract was made by the telegrams in 1911. (See page 27, Transcript.)

The point was not raised in the lower court that

the minds of the parties had not met prior to 1911. Plaintiff in error, in the court below, admitted that a binding contract was made in 1911 for the sale and delivery of two thousand bales of hops; but its contention was that this binding contract had been modified; but no question was raised as to the existence of the contract in 1911. The case was tried by both parties on the theory that such contract was made in 1911. The only contention of defendant was that afterwards it had been modified.

Even if it were a debatable question, the evidence shows that the contract was complete between the parties.

The court on appeal must confine its consideration of the case to the theory adopted by the trial court as disclosed by its instructions when there were no objections to the instructions or requests for any other instructions.

Sherman v. Mason, etc. Co., 147 N. Y. S. 609, 162 App. Div. 327.

In the Federal Courts, in actions at law, only questions presented to and determined by the trial court will be reviewed by an appellate court; and when a cause is tried upon an issue of theory presented by one of the parties in the trial court, that party will not be permitted in the appellate court to present a different issue or theory for its consideration.

Hatcher v. Northwestern Nat. Ins. Co., 184 Fed 23, 106 C. C. A. 225. No question not presented and ruled on in the trial court can be used on appeal.

De Rodriguez v. Vivoni, 201 W. S. 371, 50 L. Ed. 792.

In actions at law the function of the Circuit Court of Appeals is exclusively the correction of errors below, and questions which were not presented to nor decided by the trial court are not open for review.

> Jonathan Clark & Sons, r. City of Pittsburgh, 146 Fed. 441; affirmed in 154 Fed. 464; 83 C. C. A. 262.

Where parties with the assent of the court unite in trying a case on the theory that a certain matter is within the issues, they cannot depart therefrom on appeal.

Missouri K. & T. Ry. Co., v. Wilhoit, 160 Fed. 440.

## V.

# QUESTIONS RELATING TO BREACH OF CONTRACT.

Under this head we shall consider such objections as are urged by the plaintiff in error on what may be considered the subject matter of breach of contract and proof that the defendant was not justified in refusing to accept the hops tendered by the plaintiff below.

1. The repudiation of the contract by defendant below was premature.

Defendant in its answer alleges that in September, 1911, the defendant below in writing informed the plaintiff below that its understanding of any contract between plaintiff and defendant in relation to the hops was that shipment and deliveries of the hops should be made by the plaintiff to defendant during the months of October, November and December of 1912, and January and February of 1913, and that samples of any hops which the plaintiff should offer for deliver to defendant, in pursuance of the telegraphic offers and acceptances, should be submitted by plaintiff to defendant and approved by defendant before shipments or delivery should be made; that the plaintiff below accepted and agreed to defendant's interpretation and understanding of the said telegraphic offers and acceptances, and thereafter, in the months of September and October, 1912, the plaintiff submitted and offered to defendant for its approval before shipment samples of hops which plaintiff claimed were choice Cosumnes hops of the crop of 1912; but the said samples were not choice Cosumnes hops, but were hops of far inferior quality, and defendant refused to approve the same. (Trans. pages 28-29.)

The defendant below thereby admits that the plaintiff below had until February, 1913, in which to make deliveries. Before the expiration of that time, on November 4th, 1912, the defendant below canceled the contract. (Trans. page 58.)

By the terms of the contract, as alleged in the answer, the plaintiff below had several months there-

after to make other tenders of hops pursuant to the contract.

2. In addition to this admission contained in the pleadings, the record shows testimony was introduced on behalf of the plaintiff below showing that where, in the sale of hops, no precise time is specified for delivery, it is understood by those dealing in the commodity that the seller or shipper has until the end of the shipping season in which to make delivery; that this season extends from the time of picking or harvesting until the first of March of the following year. There was a conflict of evidence on this subject, but the Court submitted the question to the jury in the following words:

"If you find that such custom or usage existed or was known to the parties when the contract was made, then, the contract being silent as to the date of delivery, plaintiff had until the end of said shipping season to deliver the hops specified in the contract." (Trans. page 373.)

No exception was taken to this instruction.

3. Even if the pleadings were silent as to the time in which plaintiff had a right to deliver the hops, and even if there was no custom, then plaintiff was entitled to a reasonable time in which to make delivery; as, on this subject, the Court said: "Where the contract is made, as in the present instance, for future delivery of a commodity not yet grown or produced, and no time is specified for delivery, the law implies, ordinarily, that delivery shall be made within a reasonable time after the commodity has been prepared for market."

No exception was taken to this instruction.

In any one of the three instances above, it is evident that the defendant below prematurely broke the contract, before the plaintiff had had a full opportunity to perform, and upon this assumption it would be immaterial whether the samples of hops submitted by the plaintiff below to the defendant below were of the quality required by the contract or not, as the defendant below could not cut the plaintiff below off from furnishing other samples.

This is similar to a case arising in the Sixth Circuit:

"Plaintiff contracted to deliver 1,000 bales of cotton, of specified grades and at specified prices, on or before October 15, 1905, to a carrier, according to shipping directions to be furnished by defendants; plaintiff to pay cost and freight to Liverpool. About October 3d the point of delivery was changed; plaintiff agreeing to deliver at its warehouses in Birmingham and Decatur, Ala. On October 4th defendants sent an agent to Birmingham to receive cotton to be tendered there, and he, after accepting 100 bales, refused to examine or accept more, because the cotton tendered was not equal in staple to the contract quality. The agent was requested to go to Decatur and examine cotton to be tendered there, but refused, and on October 7th defendants, claiming a violation of the contract, gave notice of cancellation and thereafter refused to accept any further tenders. Held, that plaintiff had until October 15th in which to tender cotton complying with the contract, and that defendants' refusal to inspect and accept was premature, and entitled plaintiff to recover damage as for a breach of contract".

Relative to the liability of the defendant for damages in rejecting the hops prematurely, the Court in the present case instructed the jury:

"From what I have said, you will understand that if the samples submitted by plaintiff did, as indicated, fairly represent the quality of hops called for in the contract, and that plaintiff was ready and able to deliver the required quantity within the time allowed him for that purpose, then defendant was not justified in attempting to cancel or repudiate its obligation to receive them, and the plaintiff will be entitled to recover the damages suffered by it through the defendant's refusal to accept and pay for them. Whether plaintiff had the full quantity in one lot or amount or not would make no difference in that respect, if he could have procured them in time to make delivery within the terms of the contract; and with reference to the time within which such delivery was made, I shall hereafter more fully instruct you."

"If, at the time of the receipt of the defendant's telegram announcing that he canceled the contract, plaintiff was ready and able, as I have indicated, to comply with its terms, he is entitled to treat this refusal as a complete breach, which gave him the right, without further tender, of immediately commencing an action for

damages.

"The rule of damages for breach of contract by renunciation of it before the date of performance of it arrives is the amount which the injured party suffers by the continued breach, or at any time performance is due, less any abatement by reason of steps by the injured party to protect himself which the law requires him to take. That is, if you find that the defendant was not justified in refusing to accept the hops in question, the plaintiff is entitled to such damages as would justly represent the amount of its loss between the date of the repudiation of the contract and the time in which it had to make complete delivery of the hops, less the amount it could have saved by reasonably prompt disposition of the hops to others, at the best price to be obtained, as hereinafter stated, such damages not to exceed the amount demanded in the complaint—which, I believe, is \$32,000.00." (Trans. pages 372-373.)

No exception was taken to this instruction.

If there was a premature repudiation of the contract on the part of the defendant below, plaintiff was at once entitled to its damages, and it was unnecessary to consider the quality of the samples of hops tendered by plaintiff below to defendant below, as the plaintiff would have all the time during which delivery would have been made to submit other samples or accumulate other hops. The premature repudiation of the contract could not cut off this right.

- 4. However, it was contended by the defendant below:
  - (a) That samples were necessary, and,
- (b) That samples had been submitted by the defendant to the plaintiff which the defendant said were satisfactory to it, and plaintiff sent samples to meet these samples submitted by defendant.

The question was presented to the court and jury as one of fact whether these samples complied with the contract between the parties, or whether the samples offered by plaintiff were similar in quality to those which the defendant said it would accept. All the samples were before the Court and submitted to

the jury in evidence. Experts were also called for the purpose of passing their opinion as to the quality of these various samples. We understand now that plaintiff in error claims such expert testimony was not admissible, and that certain persons called as experts were not qualified as such.

As to the admissibility of expert testimony, no such point was raised in the court below. The very first witness called in the case was P. C. Drescher, who was called on behalf of the defendant out of order; he was called as an expert and gave his opinion as to the various samples. (Trans. page 80.) The defendant in the court below thus first brought in expert testimony, and the case was tried upon that theory.

Even if the question were a debatable one as to whether the subject was one admitting of expert testimony, there can be no question that expert testimony in the present cause was admissible.

Experts or those qualified by experience in a trade or occupation may testify as to:

Quality of cloth,

Peo v. Lovren, 119 Cal. 88;

Quality of gambier,

Littlejohn v. Shaw, 159 N. Y. 188, 53 N. E. 810;

Quality of lumber and fitness for given use,

Bigler v. New York, 6 Hun. 239;

Keeping quality of apples known to be merchantable at stated time,

Jones v. Emerson, 41 Wash. 33, 82 Pac. 1017;

Quality of wire rope,

Grunwald r. Freese, (Cal.) 34 Pac. 73;

Merchantable condition of raisins,

Hewes v. German Fruit Co., 106 Cal. 441;

Equality of printed matter to sample,

Sallwasser v. Hazlitt, 18 Ill. App. 243;

Quality and strength of iron in hoist hook,

Claxton's Admr. v. Lexington & B. S. R. Co., 76 Ky. 636;

Merchantability of wheat,

Pacific Coast Elevator Co. v. Bravinder, 14 Wash. 315, 44 Pac. 544.

Even if a witness is not an expert in the usual sense he may testify in any matter connected with any trade or calling in which by reason of his experience he has particular skill.

Many cases are stated in "Cyc.," from which we quote the following:

"Agriculture. Persons engaged in agriculture may testify to facts generally known in the agricultural world, such as the proper time or method for conducting various farming operations, the average yield of given crops, what constitutes a proper fence, or definite probabilities in farming. They may state what acts are prudent under given circumstances, or the effect of certain forces in operations upon land.

"Cattle and Stock Raising and the Care and Use of Domestic Animals. Witnesses experienced in cattle raising may state facts generally known in the business. Thus, they may state facts with regard to their diseases, unsoundness or pedigree; the effects of a designated treatment or the usual method of butchering. Stock raisers may state facts familiar in their art. Persons familiar with the use of horses and other domestic animals may state relevant facts not generally known as to their habits or hand-

ling.

"Mechanics. Those persons who are skilled in mechanical matters are competent to testify as to relevant facts which are familiar in the mechanic arts. Such facts may be simple and involve little of the element of reasoning, as for example the action of natural laws, the limits of ordinary observation, the lightness or the tensile or other strength of materials or appliances, under what strain they are at a given time, or how their strength is affected by given imperfections; or the facts may be more complicated without losing their essential character as facts; as where the witness states the cause of observed phenomena, the dangers attendant upon the use of particular machinery, or the prosecution of certain lines of business; how injuries from these dangers can be prevented; how mechanic operations should be conducted; the physical effects of certain mechanical devices; the results of specific defects; and in general what certain appearances would indicate to an observer experienced or skilled in mechanical trades. He may even state a conclusion regarding the sufficiency of mechanical devices for certain purposes."

17 Cyc., 66, 71.

Hops when sold are a manufactured product, that is, the green hop is picked, cured and baled.

The principal questions arising as to the quality of hops relate to the picking and curing and their freedom from disease. All hops contain more or less leaves when sold commercially. They should not be cured too much or too little. They should not be picked when immature or over-mature.

A person who testifies as to the quality of a manufactured product is not an expert, strictly speaking, but he is one who is familiar with the process involved. "Those experienced in manufacturing pursuits may state facts within their knowledge concerning them; the disease-producing effects of certain manufacturing occupations; that certain lines of manufacturing usually classed as dangerous are safe under stated conditions; the proper method of doing certain manufacturing work; and the effect of acts not so recognized."

17 Cyc., 71.

The ruling on the question of qualification of an expert is one of discretion, and will not be overturned unless there is a want of evidence to support it or an abuse of discretion.

Vallejo & N. R. Co. v. Reed Orchard Co., ...... Cal. ....., 147 Pac. 238, 252.

#### VI.

AS TO THE TESTIMONY OF THE WITNESSES CHALMERS AND TREGANZA CONCERNING THEIR OBSERVATION AS TO THE MANNER OF PICKING HOPS BY HORST COMPANY. The plaintiff in error raises the point that the

Court erredin rejecting the testimony of Chalmers and Treganza. Their testimony was received on all relevant points, but it was sought to have some testimony introduced as to conversations of men whose names were not given, or undefined on the ranch, in no way connected with the Horst Company. The hops referred to had nothing to do with the hops tendered by the plaintiff to the defendant. This was clearly pointed out by the Court's rulings on pages 304-5 of the Transcript.

The testimony of Chambers, on pages 310-11 shows that the Court allowed him to testify to anything relevant to the case. Finally all objections were withdrawn to the testimony, as follows:

"Mr. Devlin: I will withdraw our objections that we made to that testimony; I will give them a full chance." (Trans. page 313.)

The plaintiff in error was given full opportunity to introduce all this irrelevant testimony, if it so desired, but did not avail itself of the opportunity.

Any objection to the testimony thus was waived.

Estate of Ross, 50 Cal. Dec. 304. Kahn v. Trust-Rosenberg Cap Co., 139 Cal. 346; Mitchell v. Davis, 23 Cal. 384.

The testimony was, however, clearly irrelevant to any issue in the case. It in no way was connected with the samples and was hearsay.

#### VII.

QUESTIONS ARISING AS TO PROOF AMOUNTS RECEIVED ON RESALE OF HOPS, SELLING EXPENSES, VOUCHERS, BOOK OF AC-COUNTS, ETC.

Covering many pages of the brief of plaintiff in error are observations as to book entries. The objections as stated by the plaintiff in error are not borne out by the record.

This is not a case to recover for goods sold and delivered, in which the claim is proven by the introduction in evidence of the tradesmen's books.

It is a suit for damages arising from a breach of contract for the sale of hops.

The Court instructed the jury as to the proper measure of damages. It said:

"If the hops tendered by plaintiff were of the quality specified in the contract and defendant consequently not justified in refusing their delivery, plaintiff was not required to make further tender of them, but if it had such hops on hand it could proceed to sell them at the best market price obtainable at the time and place of delivery; if there was no market price at the time and place of delivery, then at the market price at the nearest market for such commodity, or if there was no existing market price then at the best price obtainable; and if this was less than the contract price plaintiff is entitled to recover the difference between that price and the amount realized by the sale plus any expenses reasonably incurred by plaintiff in excess of what it would have cost plaintiff to deliver the hops to defendant had the contract been completely performed. It is for the jury to decide what expenses, if any, thus claimed are, under the circumstances, justly and reasonably incurred. While in this case, as I have indicated, plaintiff was required, under the law, upon a repudiation of the contract by the defendant, to proceed with due diligence and expedition to dispose of the hops to the best advantage it could. and thus reduce the damages resulting through defendant's breach. If you find there was a breach, he was only entitled to incur such expense in that regard as an ordinarily prudent person would have incurred such as for brokerage, insurance, storage, cartage and the like incidents. The mere fact that plaintiff may have paid out certain expenses in reselling the hops is not in itself sufficient to entitle him to recover the expenditure against the defendant unless the jury find that it was a reasonably just and proper one, which a man of ordinary business prudence would have considered necessary to incur for the purpose." (Trans. pp. 374-5.)

# And again:

"If a contract for the sale of merchandise has been broken by the buyer, and the seller is compelled to resell at a loss, he is entitled to recover the difference between the contract price and the price that he has realized on a resale, together with his expenses exclusive of interest, interest on his demand not being claimed." (Trans. p. 375.)

These instructions were not excepted to in the court below nor challenged here, so we may assume, without citing cases, they correctly state the law.

Under these instructions plaintiff below showed:

- 1. The prices obtained on a resale;
- 2. The expenses of the resale;

These expenses under the instructions of the Court could not be allowed unless the jury found them necessary and reasonable.

Witness Horst testified as to the persons to whom the hops were resold and the prices realized on a resale. At first he did not have his books with him. Defendant below objected that the books were the best evidence. Counsel for the plaintiff then said the books could be brought into court, but it would take a great deal of time. The attorney for the defendant below said that he would prefer to examine the books in the ordinary way. (Trans. p. 75.)

The books were subsequently brought into court, exhaustively examined into and the material parts of them introduced in evidence.

In the meantime the witness testified that he was personally familiar with the several items constituting the resales. (Trans. p. 76.)

He then testified from his own knowledge without objections as to the sale of the hops to various parties. (Trans. pp. 76-77.)

When the books were produced in court the same testimony was given by the witness Lange who was the bookkeeper.

The defendant below (plaintiff in error) itself then introduced in evidence the entry of the sales made after the breach of the contract, constituting evidence to the same effect as that given by Horst based on his personal knowledge. (Trans. p. 267.)

Thus the resales, giving the dates, the persons to whom sold, the number of bales and the prices realized on resale, were shown by the testimony of Horst and also by the books which on this point were introduced by the defendant below itself.

It then became proper to show what the expenses of sale were and that the plaintiff below had done everything it could do to diminsh the damages claimed against the defendant.

The expenses of sales were shown in the first place by witnesses who testified what would be a proper charge to resell the quantity of hops rejected by defendant.

Thus witness Flint testified:

"There is no place where hops are sold by auction. They are sold by contract and personal solicitation. It is not ordinary or customary to sell by auction. Hops are sold either by paying a commission or salary. You generally pay a commission of so much per pound, one cent,  $1\frac{1}{2}$ 

cent, or two cents per pound.

"It would take some time in the condition of the market in 1912 to sell 2,000 bales of hops, because it was late in the season, and England would not take any more of our hops. It was difficult to sell a large quantity outside of the United States and it would have been very hard to sell them. You would have to force them upon some one. Make him a bargain price or something of that kind, in order to sell them. It would take a long time." (Trans. p. 209.)

In addition to this evidence, the *exact facts* as to what the reselling expenses were, and the actual amount of money received were given.

The original vouchers for money paid out by the plaintiff below were brought into court. (Trans. pp. 163-177.)

The witness was then cross-examined as to these vouchers. (Trans. p. 184.)

It was testified that the corporation E. Clemens Horst Co. paid those expenses and these salaries based upon those statements. (Trans. p. 157.)

In addition to the original vouchers that were produced in court the witness made calculations based upon the books before him as to interest, storage, freight on tare, insurance, local freight. These calculations were introduced in evidence. There was no objection made to them except they should be connected with the 2,000 bales of hops sold to Pabst Company. (Trans. p. 203.)

The witness Lange was called to make certain calculations on certain vouchers and books before the court, and in evidence.

He testified that all the hops of the plaintiff below in the United States and Canada are insured under floating insurance and that such insurance covered all the hops no matter where they are in any warehouse, or in any of their warehouses on the ranches.

The books showing the sales of the hops—the quantity and dates—were introduced in evidence. (Trans. p. 267.)

The witness made a calculation as to what would be a proper proportion for insurance.

Defendant below made no objection to the witness thus testifying but moved to strike out the answer as not responsive. (Trans. p. 146.)

A previous objection was only to the effect that the testimony took for granted that there is evidence and facts showing that 2,000 bales were set apart to the Pabst people. (Trans. p. 145.)

The witness then testified that he figured interest on losses. No objection was made to this question. This, however, is immaterial because the Court in its instruction to the jury declared plaintiff below was not entitled to interest.

The witness then testified without objection that there were various freight rates covering the sales, and that he figured the tare at five pounds per bale which is the usual trade custom and the frieght on the tare is figured on the amount of pounds of tare at the freight rate under which the invoices were made out to the various person who bought the hops.

After the testimony was given without objection, defendant below moved to strike it out, but not on any ground that the books were not before the court, nor the best evidence, because the witness was giving his computations based on the books already introduced in evidence.

Witness also figured up the item of storage. There were other charges such as local freight, cartage, weighing, sampling and repairing, and other charges that the company had the vouchers to cover, and which were presented in court. They appeared on the books in the regular course of business. No objection was made as to the witness testifying from books or vouchers, but the objection was that it called for hearsay evidence as to what the charges were and that they were not connected with the 2,000 bales. (Trans. p. 148.)

The witness then testified without objection that there were discounts to brewers for cash payments and that it was the usual custom to discount for cash payments. Those actually appeared in the books. In the ledger under bad debts and uncollectible accounts appeared the sum of \$262.19, which was the difference between the amount of the invoices and the amount collected.

After the testimony was given the defendant below objected to any testimony as to losses. There was no objection to the witness testifying from books or vouchers. (Trans. p. 149.)

On this point we quote the remarks of the Court: "If, by reason of a breach of the contract for the purchase of goods, the man left with those goods on hand, the law requires him to take all reasonable means with reasonable expedition, adopting, of course, only the ordinary methods of business, to dispose of those goods at the best figure that he can procure for them. That he owes to the one with whom he had the contract of sale, to protect him from damages as far as possible. In other words, you cannot, as I said vesterday, permit those goods to go to waste, and charge him with the whole loss. Now, if taking the usual and ordinary methods, and using all of the usual and ordinary precautions of business, he suffers a loss in the same way that a man does that carries on his business in the usual and ordinary way, he is entitled to that loss accruing on the goods which were left on his hands by reason of the breach of the contract, and in the nature of things he is entitled to recoup any loss using all due and reasonable diligence to make the most out of the goods that he can under the circumstances." (Trans. p. 150.)

All these charges the witness stated, were on the 2,000 bales (Trans. p. 150). The goods were sold in the regular course of business and the losses occurred through causes which the company could not avoid. (Trans. p. 151.)

Next, the witness testified that he had tabulated certain charges as a part of the overhead selling expense.

The Court sustained certain objections until the witness testified that the items appeared on the books of the company, that the usual and customary price per pound for selling hops was one and a half cents per pound, and that in lieu of that amount he was giving a portion of the overhead charge in the New York office for selling 1300 bales of hops. All the expenses of the San Francisco office were eliminated. He had examined the vouchers which he produced in court and which were turned over to his company for the expenses of selling those hops, and testified that he was familiar with the delivery of these hops to Eastern agents after November 4th, and until the last of what was called the Pabst hops were sold. He testified:

"I have charge of the stock room and the books, and I know the stock that goes out and where it goes to, and I know where the 2,000 bales of hops were sold, and that afterwards returns were made by our agents stating where they were sold and the prices that they obtained and I know the salaries that were paid to our salesmen from our books and I know the expenses that were incurred; and they related to the 2,000 bales of hops and the other hops. The corporation E. Clemens Horst Company paid

those expenses and those salaries based upon those statements. They were paid before this suit was commenced in the ordinary and usual course of business."

No objection was made as to the vouchers or books. The only objection was whether evidence could be given of the overhead expense as a part of the selling expense.

The witness testified without objection that the items of expenditures with reference to the business of this corporation transacted in New York or in any other place in the East, are sent on here and entered in its books here in San Francisco in the regular and orderly course of business. The reports come daily and weekly. A slip is made out by each salesman every day but they do not always send them. (Trans. pp. 157-8.)

The Court said in ruling:

"Under these circumstances I think it is perfectly competent. The nature of the business transactions of this corporation involve certain overhead charges as they are called. There is charge for regular salaries and for the expenses of transacting the business. Now, that business was, and the witness is competent to testify of a certain volume, and making up a part of that volume was the disposition of this 1346 bales of hops which it is claimed here was disposed of on a broken contract withthe Pabst Company. Now, they propose, and I think they are correct, to ask for if they are entitled to damages. If the jury finds they are entitled to damages the proportionate amount of the overhead charge which would apply to transactions involved in disposing of the 1346 bales of hops returned to them. I think they are entitled to it, if the jury

finds that they are entitled to recover at all." (Trans. p. 159.)

The statements referred to by the witness which was based upon the original vouchers, are set out in the transcript. ((pp. 163-172.)

The original vouchers were produced which the witness testified had been paid, but as they are very numerous the transcript contains certain samples as illustrative of the whole. (Trans. pp. 173-179.)

The witness then testified without objection what the proportionate share of the overhead would be, showing that it was less than the usual commission of 1½ cents per bale for selling. (Trans. p 179.)

On cross-examination the witness was examined concerning the vouchers which he produced in court. The defendant's counsel took up the various original vouchers and asked in detail concerning them as for instance where he asks, "Will you turn to some of those vouchers and give us one or two more of the items, that we will know the character of the items that are included in this? I show you an item dated November 12th, 1912. What does that refer to?" (Trans. p. 191.)

The witness gave to defendant's counsel a copy of the list for storage. (Trans. p. 201.)

The defendant in error then offered in evidence the calculations of the witness as to interest, storage, freight on tare, insurance and local freight.

No objection was made to their reception in evidence, save that they should be connected with the 2,000 bales of hops that were specially set aside as

and for the Pabst shipment after some definite time so that there will be some means of knowing that they were properly charged against Pabst. (Trans. p. 207.)

No objection not made in the court below can be made here. Even if specific objection had been made it was proper for the witness to state from his own knowledge the salaries paid and from his examination of original vouchers, produced in court and subject to examination, what the result was.

The books were filed in court. The witness Farrell, called on behalf of the plaintiff in error, testified that he had examined the sales book of the plaintiff (defendant in error) on file here and checked up the sales. (Trans. p. 365.)

Both parties read entries from the book and the same went into evidence.

To entitle a party to review a ruling overruling objections to the admission of evidence, the grounds of such objections must have been stated.

Thomas China Co. v. C. W. Raymond Co., 135 Fed. 25, 67 C. C. A. 629.

An assignment of error not supported by an exception cannot be reviewed.

Nethersland American Steam Nav. Co. v. Diamond, 128 Fed, 570, 63 C. C. A. 212.

It is indispensable to review in an appellate court of a ruling of the court below on the admissibility of evidence that it should have been challenged by an exception. Potter v. United States, 122 Fed. 49, 58 C. C. A. 231.

A general objection to a question asked a witness as "immaterial, incompetent and irrelevant" is insufficient to sustain an assignment of error.

Shandrew v. St. P. M. & C. Ry. Vo., 142 Fed. 320, 73 C. C. A. 430.

Where no objection is made or exception taken to the evidence introduced by the opposite party, and no ruling therein is invoked or made there can be no error for review.

Randle v. Barnard, 99 Fed. 348, affirmed 110 Fed. 906, 49 C. C. A. 177.

Objection to questions propounded to witnesses not brought to the attention of the lower court and its opinion taken thereon, cannot be reviewed.

Eli Mining Co. v. Carleton, 108 Fed. 24, 47 C. C. A. 166.

An objection to evidence is waived where it does not give fair notice of its grounds, which could have been obviated by opposing counsel had he understood the objection.

> Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 131 C. C. A. 504.

"Moreover, the objection which has been considered was never called to the attention of the court below or ruled by it, and an appellate court cannot declare that the trial court erred

in a ruling that it has never made upon a question never presented to it."

Ottumwa Co. v. Christy Co., 215 Fed. 362, 131 C. C. A. 504.

In a case arising in the eighth circuit, the Court said:

"Another specification of error is that a witness was permitted to testify, over the objection that his testimony was incompetent and immaterial, to a statement which he had prepared from the books of account in evidence of the amounts which, according to those books, had been received and paid out in the office of which Kelly had charge, between April 24, 1895, and April 2, 1898. The objection now urged is that the computation covered 33 days prior to the commencement of the term of the bond, and it is contended that the ruling is erroneous on that ground. But the general objection that the testimony was incompetent and immaterial did not fairly apprise the court or the counsel of this reason for the rejection of the evidence. A general objection of this character is undoubtedly sufficient when the ground upon which it is founded is discernible. But when the reason for the rejection is not perceptible, it is the duty of the counsel who relies upon it to clearly call the attention of the court to the ground of the objection. Otherwise the general objection serves rather to conceal than to present the real reason for the rejection of the evidence. A general objection which has this effect must be disregarded in the appellate court. It cannot be permitted to form the basis for a reversal of a judgment when the reason for the objection was not called to the attention of the court and counsel at the trial."

Guarantee Co. of North America v. Phoenix Ins. Co., 124 Fed. 175, 59 C. C. A. 376, 381.

The evidence as to the expenses of a resale of the rejected hops was proper.

In the first place such evidence was admissible to show the facts as to what the rejected hops actually realized. This evidence consisted on one hand of what the plaintiff actually received and on the other of what it paid out.

This case is to recover damages for a breach of contract. The plaintiff was compelled to sell the hops for the best prices reasonably obtainable in the nearest available market, and was entitled to a reasonable selling expense.

As there was no segregation of the hops the plaintiff showed the expense of selling all the hops that it had on hand. It did not include the expenses of its San Francisco office and the defendant was given the benefit of these free from any claim. It showed to a certainty what cost it went to for storage, insurance, interest, etc. This left the only item its selling expense. As testified to by witnesses, the hops could not all be sold in San Francisco. In order to sell these hope in the East, it was necessary to have a selling force. The expense of this selling force was shown by the vouchers themselves paid out by the plaintiff below in the usual and ordinary course of business. When the vouchers were produced the books became superfluous because the books contained only the amounts stated in the vouchers which were the original evidence.

Witness Horst testified that there was no nearest available market. "You have got to sell them wherever you can sell them, wherever you can sell them." (Trans. p. 239.)

It was admitted in the court below that the plaintiff below was entitled to its reasonable expense in selling the Pabst hops, provided Pabst was in default.

When the original vouchers were produced, the only question was were they paid, and it was proper to show what expenses Horst Company had been put to in selling a quantity of hops in which was included without segregation the hops rejected by Pabst. That Horst Company had actually paid out the money represented by the vouchers was proven by independent witnesses. That these expenses constituted a gross sum for the sale of the Pabst hops and other hops sold at the same time was proven. It was testified that the expenses represented by the vouchers all related to the sale of hops in the East and that they were sold as quickly and cheaply as possible.

The purpose of the testimony was to show the prices actually realized by the plaintiff below and the expenses actually paid. If such expenses were actually paid they must be deemed reasonable. But whether this be so or not, the jury were told that they were the judges whether they were reasonable. No claim is made that the plaintiff received more money for the hops than testified, or that the money represented by the vouchers was not actually paid out.

In a case where a breach of sale has occurred and the plaintiff is selling for defendant's account, he may be allowed a reasonable amount for his selling expenses, and when he has sold his own goods and those in trust for defendant, the jury certainly may hear what his expenses were.

No objection was made to the charge of the jury in the case before this court giving the law relative to the measure of damages. No instruction was asked by plaintiff in error as to the rule of damages. The evidence was admissible for the purpose of showing selling expenses on the question of the measure of damages, but whether it was or not, it certainly was admissible on the question of how much the plaintiff actually below received and paid out or claimed to pay out.

Evidence admissible for any purpose is properly admitted over a general objection.

Parks v. Giffith & Boyd Co., 91 Atl. 581, 123 Md. 233.

A general objection that evidence is not admissible at all should not be sustained, where it is material and admissible for any purpose.

Commonwealth Bonding & Casualty Co. v. Hendricks, 168 S. W. 1007.

Where evidence is admissible for a particular purpose, defendant cannot upon mere general exception place the Court in error for receiving it.

Barfield v. Evans, 65 So. 928.

Most of the evidence was given without objection or exception.

In the Federal courts an exception, taken immediately on a ruling being made, is indispensable to a review of the ruling by an appellate court.

Chicago, B. & Q. Ry. Co. v. Frye-Bruhn Co., 184 F. 15, 106 C. C. A. 217.

A ruling to which no exception was taken cannot be reviewed on a writ of error.

Skeele Coal Co. v. Arnold, 200 F. 393.

An exception to the charge of the Court, or its refusal to charge, is indispensable to review.

Mexico International Land Co. v. Larkin, 195 F. 495, 115 C. C. A. 405.

Where no exception was taken to the Court's charge, errors thereon are not available on writ of error.

Gering v. Leyda, 186 F. 110, 108 C. C. A. 222.

An appellate court of the United States cannot weigh the evidence to determine whether or not it is sufficient to sustain a verdict.

Toledo, St. L. & W. R. Co. v. Howe, 191 F. 776, 112 C. C. A. 262.

In the Federal courts questions of fact, determined by the jury, properly instructed, are not reviewable.

Transit Development Co. v. Cheatham Electric Switching Device Co., 194 F. 936, 114 C. C. A. 599.

A judgment will not be reversed because of the admission of incompetent or irrelevant evidence unless it fairly appears to have been prejudicial.

Post. Pub. Co. v. Peck, 199 F. 6.

In an action on an implied agreement to pay rent, where defendant was a tenant by sufferance, the admission in evidence of a conversation between defendant and an agent of plaintiff in regard to the amount of rent to be paid, which did not result in an agreement, even if error, was without prejudice to defendant.

United States v. Whipple Hardware Co., 191 F. 945, 112 C. C. A. 357.

The admission of incompetent evidence is not prejudicial, where it added nothing of moment to the evidence already introduced on the same subject.

Wilhite v. Houston, 200 F. 390.

Where plaintiff, a switchman, alleged injury because of the use of a road tender on a switch engine, and it appeared that on the night of the injury the road tender had been placed on the switch engine in an emergency only, evidence that the tender was put out of commission the same night after the injury, and her number painted over, was not prejudicial to defendant.

Atlantic Coast Line R. Co. v. Linstedt, 184 F. 36, 106 C. C. A. 238.

In an action for injuries, the complaint alleged that by reason of the injuries plaintiff had lost the use of the muscles of his left leg, had lost a great deal of feeling, and that he could not properly control his left foot, plaintiff's physician testified that there was some swelling in the limb extending to the foot and ankle; that there had been a sore on the heel which would not heal, apparently made from pressure; and that it might have been by direct injury or have resulted from pressure. Held, that defendant was not prejudiced by the court's permitting plaintiff to testify over objection that he had a sore on his heel, that suppurated at times, which was nearly half an inch deep, and to exhibit his foot to the jury, though the testimony was not strictly relevant under the allegations and complaint.

(C. C. A., 1911) Katalla Co. r. Rones, 186 F. 30, 108 C. C. A. 132, affirming judgment (C. C., 1910) Rones r. Katalla Co., 182 F. 946.

## VIII.

### THE ITEMS OF SELLING EXPENSE.

For the purpose of showing damages the plaintiff proved:

1. The amount actually received on a resale, as evidence of difference in value.

This was proven by Horst who testified from

personal knowledge and also by the plaintiff in error in introducing the books in evidence. (Page 267.)

2. The difference between the price which the seller could have obtained therefor in the market nearest to the place at which the hops should have been accepted by the buyer and at such time after the breach as would have sufficied with reasonable diligence for the seller to effect a resale.

Civil Code, Sec. 3353.

The market price for hops that prevailed after the repudiation of the contract, was testified to by witnesses. (Trans. p. 79 and p. 213.)

- 3. The selling expenses. These expenses consisted of:
  - (a) Storage, \$153.50 (Trans. p. 201).
  - (b) Insurance, \$25.98 (Trans. p. 204).
  - (c) Freight on tare, \$188.43 (Trans. pp. 204-5).
  - (d) Interest, \$310.73 (Trans. pp. 206-7).
- (e) Proportionate share of overhead expenses, \$4,459.30 (Trans. p. 179).
- (f) Uncollectible accounts or bad debts, being the difference between the amount of the invoices and the amount collected, \$262.19 (Trans. p. 149).

The interest charge in the instructions of the Court was eliminated. The Court also limited the expenses to brokerage, insurance, storage, cartage and the like incidents and told the jury, "The mere fact that plaintiff may have paid out certain expenses in reselling the hops is not in itself sufficient to entitle him to recover the expenditure against the

defendant, unless the jury find that it was a reasonably just and proper one which a man of ordinary business prudence would have considered necessary to incur for the purpose." (Trans. pp. 374-5.)

No exception was taken to this instruction.

The whole matter thus under proper instructions was left to the jury.

That the seller is entitled to recover his selling expenses is undoubted.

The measure of damages upon a resale of the goods is the difference between the contract price of the goods and the price which they produced at the resale if fairly made after deducting therefrom the expenses of the vendor in caring for the goods and selling them.

Winson v. Gregory, 2 Cal. App. 313.

The seller has the right to resell the goods and charge the vendee with the difference between the contract price and that realized at the sale.

Morris v. Webaugh, 43 N. E. 842.

In case of breach of contracts of sale the plaintiff is entitled to be made whole.

In a charge to a jury United States Circuit Judge Putnam said:

"The plaintiff is entitled as damages to a sum equal to the value of the contract to the plaintiff; in other words what would have been made from it, if defendant had performed it."

Rantoul v. Claremont Paper Co., 196 Fed. 307.

In that case the Court held that where defendant violated a contract to manufacture for plaintiff at specified prices, defendant refusing to receive the pulp or manufacture the paper, the Court properly charged that the jury might deduct from the estimates of plaintiff's loss a sum representing the proportionate cost of doing the business, or on account of probable loss of accounts, insurance accounts and selling expense.

The instruction given by the Court was:

"You should deduct from the plaintiff's claim, if you get to damages, such sum as you find it would have cost to have done the business, including probable loss of accounts and customers bills, interest on account and selling expenses."

### Said the Court:

"As it must be assumed that all these matters were inherent in transacting the business and yet could not be specifically estimated or proved, it was within the province of the jury to make a reasonable deduction in reference thereto. It follows that this instruction was generally correct, and a general exception to it cannot lie. If erroneous in any particular, the particular should have been pointed out and the facts appertaining thereto made to appear in the record."

# Rantoul v. Claremont Paper Co., supra.

In that case, even where the selling expense had not been incurred, bad debts had not been lost, etc., the Court held the jury could estimate these items in fixing the plaintiff's profits.

Expenses of resale by auction held properly included.

Whitney v. Boardman, 118 Mass. 242, 248.

Expenses proper item also that sale must be according to usual mode in the trade, *i.e.*, through brokers in the instant case rather than by auction.

Pollen v. Le Roy, 30 N. Y. 549, 557.

Expenses of sale and interest to be taken into consideration.

Hardwick v. American Can Co., 113 Tenn. 657, 88 S. W. 797; Pope v. Filley, 9 Fed. 65.

Expenses to be added to amount lost on resale.

American Hide & Leather Co. v. Chalkley, ...... Va. ......, 44 S. E. 705, 706.

The only items objected to are:

- 1. Overhead expense;
- 2. What plaintiff in error calls bad debts or the difference between the invoice of sales and the amount actually received.

We claim that under the instructions of the Court these were proper matter for the jury to consider. The Court did not tell the jury to allow them, but even if it did it would be perfectly proper, and as we have pointed out no exception was taken to the charge.

As to the overhead expense, there can be no question but that if the plaintiff below had employed brokers to sell the hops, it would be entitled to recover the amount it paid the brokers for that purpose, if such was the usual amount charged by brok-

ers. But as the plaintiff below had its own selling force, it did not employ brokers but sold through its own selling agents in the East and proportioned that cost to the whole cost of selling the hops rejected by defendant below with other hops.

This was highly favorable to the defaulting buyer (defendant below).

Figuring the broker's charges at 1½c a pound,—the usual commission—the commission would be \$5700.00. (Trans. p. 179.)

The proportionate share of overhead expense was \$4,459.30.

This gave the defendant below the best of it to the extent of \$1,240.70. (Trans. p. 179.)

Even if there was any error in admitting evidence as to overhead expense, it was cured by the other evidence that the reasonable cost of selling by the payment of a broker's commission, exceeded the amount shown as proportionate share of overhead expense (Testimony of Horst, p. 118; testimony of Lange, p. 179).

Hinckley v. Pittsburgh Steel Co., 121 U. S. 264, 30 L. Ed. 967, 971.

As to the so-called bad debts. Plaintiff below sold in the usual and ordinary manner and tried to realize the best results from the resale and sold hops to some brewers from which it did not receive payment.

It is to be remembered that the Court told the jury not to allow any selling expense it thought was

not reasonable. The propriety of the various elements of expense as testified to, was a question for the consideration of the jury, rather than for the Court in passing upon the admissibility of the evidence.

Evidence that the seller notified the buyer, upon his refusal to consummate the agreement of purchase, that he would sell the property to some one else for what he could get for it and hold him responsible for the difference, and that he advertised it and sold it for a certain price, which was the highest price he could get, is competent as tending to show the amount of damages actually resulting from the breach of the contract.

Gibbs v. Ranard, 86 Cal. 531.

The measure of damages, in cases such as the one at bar, is the one fixed in the Civil Code of California, as follows:

"In estimating damages, the value of the property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract, as would have sufficed, with reasonable diligence, for the seller to effect a re-sale."

Civil Code, Cal., Sec. 3353.

While in such a case the seller may show what he received on a resale, where the purchaser has refused to accept the property, still the amount received at the sale is not conclusive evidence of value by which to measure the damages for which such buyer is liable. Meyer v. McAllister, 24 Cal. App. 16.

The plaintiff below proved by Horst and others the difference in value, in accordance with the above section of the Code and the instruction of the Court. The amount obtained on a resale was evidence, but not conclusive, and the damages were satisfactorily proven by the method laid down in the Code.

The plaintiff in error entirely misconceives the rule of damages applicable to a case like the present one. In favor of the seller the measure of damages is the difference in value to the seller between the contract price and the price which he could have obtained for it in the market place at which it should have been accepted by the buyer.

Civil Code, Cal., Sec. 3353.

The seller is not compelled to sell the property at all. He may retain the property and recover the difference in value.

Plaintiff below introduced evidence showing this difference in value, and this difference constituted his damages.

orst testified (p.79) The price in February can from 14 to 16 cents. Flint testified (p.213). The price was about 14%. The difference between this price and the contract price constituted plaintiff's damages.

paid out, and, in case he performs services in selling, what the reasonable value of such services is. Evidence of this character is not conclusive, but it is

admissible as tending to show difference in value within the meaning of the Code.

Even if the property had been pledged for a debt and the pledgee had sold to satisfy the debt, and he sold in the usual and customary manner, he would be entitled to all reasonable expenses in and about selling the property, including the services of brokers, if hired by him, or if he had a selling force, the reasonable value of their services, or if they sold other goods with those pledged, a proportionate part of the selling expense.

The court instructed the jury in accordance with the rule of damages laid down in section 3353 of the Civil Code of California, and no exception was taken to the instruction.

We claim that none of these matters are reviewable on the record as presented.

If, however, the Court should be of the opinion that the matter is reviewable here, and also of the opinion that loss on bad accounts or any other item was erroneously considered, the extent to which the jury might have been affected can be exactly determined as being the amount of such item. The cause for that reason will not be reversed, but the defendant in error will be allowed to remit that portion of the judgment which may be, on condition of such remission, affirmed.

Thus, where the trial court has erroneously instructed the jury as to the measure of damage in a certain particular, and it is apparent that the erroneous assessment under the instruction could not

have exceeded a given sum, the appellate court will affirm the judgment on condition that plaintiff remit such excess.

Hazard Powder Co. v. Volger, 58 Fed. 152.

The Supreme Court of the United States held, "In this case the only error being in the allowance of interest, the court orders the judgment to be affirmed if the interest be remitted; otherwise to be reversed for that error."

Washington v. Harmon, 147 U.S. 571;

See also

Hansen v. Boyd, 161 U. S. 397.

#### IX.

### OTHER ALLEGED ERRORS.

1. Testimony in rebuttal.

Plaintiff in error contends that it was error to allow witness Horst to testify in rebuttal. This is so much a matter of discretion with the court below that it is useless to argue it.

The admission in rebuttal of testimony which is not strictly rebuttal, but which should have been introduced in chief is within the discretion of the court.

Erie R. Co. v. Kennedy, 191 Fed. 332, 112 C. C. A. 76.

2. Limiting cross-examination.

The court below when it believes that the cross-

examination of a subject has been exhausted or is becoming unduly tedious and protracted may limit the cross-examination in its discretion. This case involving a simple issue of fact occupied nine court days, (Trans. p. 44), most of which was consumed by defendant's cross-examination. Surely it had ample time.

# 3. Defendant's counter-claim.

On page 131 of brief of plaintiff in error a few lines are confined to its counter-claim. Counsel say that the ruling of the court confining the testimony to "air-dried hops" destroyed its opportunity to establish its counter-claim. As we have heretofore pointed out, the quality of the hops as "air-dried" hops was fixed by the pleadings. For the reasons advanced by counsel for plaintiff in error as well as those given by the court, (Trans. p. 381), the instruction as to the counter-claim was proper.

4. As to plaintiff below having hops on hand.

Whether the plaintiff below had sufficient hops on hand to meet the contract, if the defendant below had not repudiated it, was a question of fact to be passed upon by the jury.

Witness Lange testified that there were 3062 bales of Cosumnes hops on hand in November, 1912. (Date of repudiation of contract.) (Trans. p. 180.)

To similar effect was the testimony of Horst. (Trans. p. 365.)

The account of sales introduced in evidence shows the number of bales of Cosumnes hops on hand

November 4, 1912, and to whom sold, (Trans. p. 267), showing an excess of 2000 bales.

Even if Horst had no hops on hand at all, he had the right to procure the hops and apply them on the contract.

4. Proposed Instruction No. 3. Plaintiff in error requested an instruction, the material parts of which had already been given by the court. The only new part requested was that the correspondence had changed the original contract by providing that plaintiff below should supply hops according to certain samples furnished by defendant below. The correspondence shows that there was no modification of the contract.

If, however, any argument was needed to show that such instruction should not have been given, it is afforded by the brief of the plaintiff in error (pages 126-131). In the brief it is contended that all questions arising as to whether the contract was changed by the acts of the parties were for the jury to decide under proper instructions, and the plaintiff in error claims that it tried the case upon the theory that the jury was to find whether the contract was modified.

Yet the instructions proposed did not leave the jury to find whether the contract was modified or not, but was positive in its terms that the contract had been modified.

If the plaintiff in error correctly states abstract principles of law, then in addition to the other reasons given, the instruction was properly refused.

### DAMAGES AND COSTS ON AFFIRMANCE.

We ask in this case for an affirmance of the judgment and for damages and costs.

The judgment in this case was rendered on April 29th, 1914. During all of this time plaintiff has been kept out of its money.

No question presented by the plaintiff in error is, for the reasons pointed out, reviewable. A large portion of the brief of plaintiff in error is devoted to a discussion of the testimony. As the only question before the jury was one of fact, and as the contract was in writing, and its repudiation admitted, and as no exceptions on any material point were taken to the charge of the jury, and as no error committed by a jury in finding the amount of damages can be reviewed on a writ of error, the only effect of the writ of error in this case has been to cause the defendant in error long and unnecessary delay in collecting its judgment.

As held by the Supreme Court:

"On a writ of error, this court cannot review any error committed by a jury in finding the amount of damages; nor take cognizance of a complaint that a motion for a new trial was overruled; or that the verdict of the jury was contrary to law and not warranted by the testimony",

and the Court holding that the writ of error was sued out merely for delay, awarded ten per cent damages on the amount of the judgment, in addition to interest.

Wilson v. Everett, 139 U.S. 616.

See also

Armory v. Armory, 139 U. S. 616; Rev. Stats. U. S., Sec. 1010.

We believe that the plaintiff in case of a broken contract should be made whole so far as it is in the power of the Court to do so. The payment of interest on the judgment falls far short of doing this.

Respectfully submitted,

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Nov. 4, 1915.













